United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7177

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

RAYMOND ROHAUER and CECIL W. HULL,

Plaintiff-Appellee,

against

KILLIAM SHOWS, INC., PAUL KILLIAM, EDUCATIONAL BROADCASTING CORPORATION, and THE BOWERY SAVINGS BANK,

Defendants,

KILLIAM SHOWS, INC., EDUCATIONAL BROADCASTING CORPORATION,

Defendants-Appellants.

JOINT APPENDIX

PETER JASZI
Attorney for Defendants-Appellants
1847 Calvert Street, N.W.
Apt. 6
Washington, D.C. 20009
(202) 462-2465

and

JEFFREY SQUIRES
2415 20th Street, N.W.
Washington, D.C. 20009
(202) 483-3633

and

ABRAHAM FUSS
LAITMAN, MATHEWS & MAGIDSON
1450 Broadway
New York, New York 10018
(212) 221-6050

HERBERT P. JACOBY
BURNS & JACOBY
Attorney for Plaintiffs-Appellees
445 Park Avenue
New York, New York 10002
(212) 980-3200

UNITED STATES COURT OF APPEALS
FILED
JUL 9 197
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

PAGINATION AS IN ORIGINAL COPY

INDEX

Page

Docket.....1 A

Stipulation of Facts.....4 A

Attached Exhibits:

Copyright Certificate, Novel.....15 A
Assignment; Hull to Moskowitz.....16 A
Renewal Certificate, Novel.....19 A
Assignment; C.W. Hull to R. Rohauer.....21 A
Letter; O'Brien to Killiam, 5/12/66.....24 A
Letter; Galfunt to N.E.T., 7/12/71.....25 A
Letter, WNET to Galfunt, 7/16/71.....26 A
Letter, Jacoby to EBC, 10/6/71.....27 A
Renewal Certificate, Motion Picture.....29 A
Assignment; Jensen/Gregstan.....30 A

Defendant's Exhibit "C".....39 A

Order of U.S. Court, S.D. of Iowa.....47 A

TRANSCRIPT OF TRIAL:

November 5, 1973.....54 A

November 7, 1973.....95 A

Opinion of Judge Bauman.....131 A

Final Judgment.....158 A

1 A

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Pierce

JUDGE PALMIERI

Jury demand date:

71 CIV. 418

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
MOND ROHAUER AND CECIL W. HULL AGAINST, LLIAM SHOWS, INC. 3-3-76 ~~WILLIAM~~, 8-8-74 OCATIONAL BROADCASTING CORPORATION. AND 3-3-76 ~~THE BOWERY~~ SAVINGS BANK. 8-6-74 2/10/72 ART CINEMA ASSOCIATES, INC. MRS. EMIL JENSEN ind. and on behalf of the Estate of Emil Jensen WALTON & CO. INC. 3rd Pty. Defts.	For plaintiff: SCHWARTZ, MERMELSTEIN, BURNS, IESSEN & JACOBY. 445 Park Avenue, N.Y.C.N.Y. 1002 For defendant COPPOLA & D'ONOFRIO 123 William St.,NYC 10038 (deft. Bowery Saving Bank)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk				
J.S. 6 mailed 3-3-76	Marshal				
Basis of Action: COPYRIGHT INFRINGEMEN	Docket fee				
	Witness fees				
Action arose at:	Depositions				

BEST COPY AVAILABLE

JUDGE PALMIERI
71 CIV. 41

DATE	PROCEEDINGS	Date Judge
Sept.22-71	Filed Complaint. Issued Summons.	
Sept.22-71	Filed Notice of Assignment. J. Palmieri.	
Oct.19-71	Filed stip and order that the time for deft.The Bowery Savings Bank, to answer complaint is ext. from 10-18-71 to 11-1-71. Palmieri, J.	
Oct.22-71	Filed ANSWER of deft. The Bowery Savings Bank, to complaint	C&D
Nov.5-71	Filed consent and order substituting Coppola & D'Onofrio as attorneys for Bowery Savings Bank. So ordered. Palmieri, J.	
Nov.29-71	Filed summons with marshal's ret. Served: Killiam Shows,Inc. by Paul Killian, Pres. on 9/30/71. Paul Killiam personally on 9/30/71. Educational Broadcasting Corp. by Michael Prescott on 9/27/71. The Bowery Savings Bank by Lorelei Gregory on 9/28/71.	
Dec.29-71	Filed Notice to take Deposition.	
Feb.10-72	Filed third party complaint and issued 3rd pty. summons.	
Jul 24-72	Filed 3rd pty summons with marshal's ret. Served Walton & Co.Inc. c/o Shearman & Sterling by John Maddan on 3/1/72. Served Art Cinema Associates,Inc. UNABLE TO SERVE	
Oct.11-72	Filed additional summons & marshals return 3rd party defts served 9-27-72 by U.S.M. M Miner.	
Nov. 5-73	Before Bauman, J.-Non-jury trial begun	
Nov. 7-73	Trial continued & concluded-Decision Reserved.	
Dec.5-73	Filed transcript of Nov. 5 & 7, 1973.	
Aug 8-74	Filed Deft. Killiam Shows, Inc.'s Motion to dismiss pur. to Rule 12(b) (6)	
Aug 8-74	Filed Deft. Memo. of Points & Authorities in support of deft. Killiam's motion to dismiss.	
Aug 8-74	Filed Pltff. Rohauer's affdvt. in opposition to motion to dismiss.	
Aug 8-74	Filed Pltffs' Memo. in opposition to motion to dismiss.	
Aug 8-74	Filed Pltffs' Supplemental Memo. in opposition to motion to dismiss.	
Aug 8-74	Filed Pltffs' Supplement.	
Aug 8-74	Filed Deft's(Killiam) response to pltffs' memo. in opposition to motion to dismiss.	
Aug. 8-74	Filed Stipulation of Facts.	
Aug 8-74	Filed Trial Memo. of Killiam Defts.	
Aug 8-74	Filed Trial emo. of Deft. Bowery Savings Bank.	
Aug 8-74	Filed Pltffs' Trial Memo.	
Aug 8-74	Filed Pltffs' post trial reply memo.	
Aug 8-74	Filed Killiam Defts' suppl.	
Aug 8-74	Filed Transcript of proceedings dated Nov. 5, 7, 1973.	
Aug. 8-74	Filed Opinion#41079.....Accordingly, the motion of deft. Killiam Shows to dismiss is denied.....Conclusion .....For all of the reasons herein stated, I hold that pltffs' renewal copyright in the novel "The Sons of the Sheik" was infringed by the performances of the motion picture "The Son of the Sheik" on July 13, Oct 11, and Oct 16, 1971. I further hold that defts. Killian Shows, Inc. and Educational Broadcasting Corp. are jointly and severally liable for such acts of infringement. Finally, I hold that defts. Paul Killian & Bowery Savings Bank are not liable, and the action is accordingly dismissed as against them. It Is So Ordered..... ...Bauman, J...m/n	
Aug 9-74	Filed Deft. Bowery Savings Bank's proposed findings of Fact & Conclusion at law.	
Aug 15.74	Filed Interlocutory Judgment. Order that the complaint is dismissed as against defts. Paul Killiam & The Bowery Savings Bank & the motion of deft. Killiam Shows Inc., is in all respects denied; & defts. Killiam Shows Inc. & Educational Broadcasting Corp. & each of them, their respective officeres, etc. are permanently enjoined & restrained as indicated & that all questions relating to the right of pltff. as indicated be referred to Magistrate Schreiber as indicated; & that the issues raised by 3rd pty complaint are severed with leave to defts. Killiam Shows Inc & Paul Killiam as indicated. Bauman J. (mailed notice)	

Cont'd Page #3.

B

D. C. 110 Rev. Civil Docket Continuation

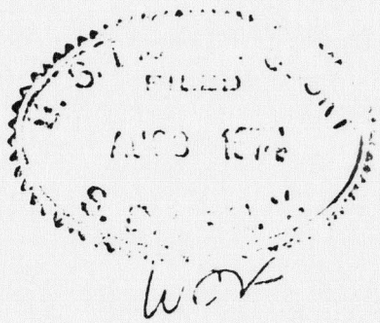
DATE	PROCEEDINGS	Date Judgm
Aug.21-74	Filed notice of reassignment to Judge Pierce.	
ct.2-74	Filed memo endorsed on Judgment filed 8-15-74--The matter herein is re-referred from Magistrate Schreiber to Magistrate Hartenstine for determination of damages costs and disbursements as well as counsel fees. The Magistrate is requested to contact the parties. So Ordered--Pierce, J.	
Nov14-75	Filed Repor t of Mag. Hartnestine to Pierce, J.	
Nov14-75	filed pltffs Affidavit in support of application for attys fees, as indicated.	
Nov14-75	Filed pltffs stipulation of facts for damage hearing.	
Nov17-75	Filed Magistrates correcting memorandum as indicated.	
Dec2-75	Filed Pltffs Notice of filing objections to Magistrates report.	
Dec5-75	Filed pltffsAffidavit & Notice of Motion for an order rejecting Findings of Fact 20 and 21 and Conclusions of law 9 contained in the said report, etc, as indicated rtble before Pierce, J. on 12-19-75.	
Dec15-75	Filed Notice of Filing of objections to report of Mag. by defts indicated.	
Jan26-76	Filed defts Affidavit & Notice of Motion for an order approving the report of the Magistrate rtble before PiereeJ. on 1-30-76	
Feb 4-76	Filed memo endorsed on motion filed 1-26-76: Accordingly the motion to adopt the Report and Recommendation of the Magistrate is granted. Pierce, J. M/N.	
3-76	Filed Final Judgment that pltff Raym ond Rohauer recover from defts Killiam Shows Inc. and Educational Broadcasting Corp. the sum of $2,250.00 as damages for their infringing acts and that said pltff recover his costs and disbursements to be taxed by the Clerk of this Court. Pierce, J. Judgment Entered. Clerk. 3-5-76. Judg # 76155	
-76	Filed Notice that defts Illiam Shows Inc. and Educational Broadcasting Corp. hereby appeals to the U.S.C.A.P. from the judgment entered against them on 3-1-76. M/N.	
-26-76	Filed motion by deft. Killiam Shows, Inc. to stay the money judgment against Killiam during the pendency of Killiams appeal etc, as indicated, rtble before Pierce, J.	
9-76	Filed order that the ,o judgment against Killiam in this matter be stayed, cont ngent on the post f a supersedeas bond in the amount of $2,250.00,pending the resolution of its eal, Pierce, J. M/N.	
ay 19-76	Filed stipulation that defts. may file a copy of the original answer and amended answer and be included in the record on appeal.	
ay 19-76	Filed ANSWER of defts. Killiam Shows, Inc., Paul Killiam & Educational Broadcasting Corp to complaint.	
May 19-76	Filed AMENDED ANSWER of defts. Killiam Shows Inc., Paul Killiam & Educational Broadcasting Corp. to complaint.	

*Transcript of Feb 4-76 and Mar 3-76

Feb 4-76 Filed memo endorsed on motion filed 1-26-76: Accordingly the motion to adopt the Report and Recommendation of the Magistrate is granted. Pierce, J. M/N.

Mar 3-76 Filed Final Judgment that pltff Raymond Rohauer recover from defts Killiam Shows Inc. and Educational Broadcasting Corp. the sum of $2,250.00 as damages for their infringing acts and that said pltff recover his costs and disbursements to be taxed by the Clerk of the Court. Pierce, J. Judgment Entered. Clerk. 3-5-76.

BEST COPY AVAILABLE



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RAYMOND ROHAUER and CECIL W. HULL, :

Plaintiffs, : Index No. 71 Civ 4183

-against- : STIPULATION OF FACTS

KILLIAM SHOWS, INC., PAUL KILLIAM, :
EDUCATIONAL BROADCASTING CORPORATION
and THE BOWERY SAVINGS BANK, :

Defendants. :

- -x

It is hereby stipulated and agreed by and between the undersigned that for the purposes of the trial of this action, the following facts and matters are deemed to be admitted:

A. IN CONNECTION WITH PLAINTIFFS' CLAIMS

1. This action arises under the Copyright Act of the United States, Title 17 U.S.C. Section 1 et seq. and this Court has jurisdiction of the same.

2. Plaintiff Cecil W. Hull (herein called "Hull") is, and at all times relevant to this action was a citizen and domiciliary of the United Kingdom of Great Britain. She is a nominal party plaintiff and has joined as a party solely because she is the record owner of the United States renewal copyright claimed to have been infringed.

3. Plaintiff Raymond Rohauer (herein called "Rohauer") is and at all times relevant to this action was a citizen of the United States and a resident of the Southern District of New York.

4. Defendant Killiam Shows, Inc. (herein called "Shows") is and at all times relevant to this action was a corporation organized and existing under and pursuant to the laws of the State of New York, having an office and transacting business in the Southern District of New York. Said defendant is and was engaged, among other things, in the business of distributing and licensing feature length motion pictures for exhibition, both theatrically and by means of television throughout the United States.

5. Defendant Paul Killiam (herein called "Killiam") is and at all times relevant to this action was a citizen of the United States and a resident of the Southern District of New York. He is and was an officer, director and sole stockholder of defendant Shows, as well as other affiliated corporations engaged in the same or a related line of business.

6. Defendant Educational Broadcasting Corporation (herein called "Broadcasting") is and at all times relevant to this action, was a corporation organized and existing under the laws of the State of New York, having an office and transacting business in the Southern District of New York. It is and was the owner and operator of television station WNET in New York City, operating on Channel 13.

7. Defendant, The Bowery Savings Bank (herein called "Bowery") is and at all times relevant to this action was, a banking corporation organized under the Banking Laws of the State of New York, having an office and transacting business in the Southern District of New York.

8. Prior to May 15, 1925, one Edith Maude Hull (herein called the "Author"), a citizen of the United Kingdom of Great Britain, wrote and composed a new and original novel containing copyrightable subject matter under the laws of the United States entitled "The Sons of the Sheik" (herein called the "Work").

9. Pursuant to arrangements made with the author, the Work was first published in the United States by Small, Maynard & Co., Inc. (herein called the "Publisher") on or about May 15, 1925 with proper notice of copyright in its name, and said Publisher complied in all respects with the requirement of Title 17 U.S.C., as the same existed at that time.

10. Publisher duly registered the Work in the United States Copyright office and received fromthe Registrar of Copyrights a Certificate of Copyright Registration bearing Registration No. A: 855221, (a copy of which is annexed hereto as Exhibit A), and all copies of the Work made by the Publisher, or under its authority or license, have been printed, bound and published in strict conformity with the provisions of Title 17 U.S.C.

11. On or about November 23, 1925 the Publisher assigned and transferred to the Author the United States Copyright in the Work and by agreement dated December 7, 1925 (a copy of which is annexed hereto as Exhibit B), the Author granted to Joseph H. Moskowitz, his successors and assigns, all of the motion picture rights in the Work for the entire world, together with the sole and exclusive right to make motion picture versions thereof or based thereon.

12. Pursuant to the agreement dated December 7, 1925, a motion picture photoplay entitled "The Son of the Sheik" (herein called the "Photoplay") based upon the Work and starring Rudolph Valentino was produced and copyrighted by and in the name of Feature Productions, Inc., as successor in interest to Joseph H. Moskowitz, and the same was released for theatrical exhibition in the United States in and during the year 1926.

13. The Photoplay embodies incidents portrayed in the Work, utilizes the characters created by the Author appearing in and acting out sequences from the Work, and was and is a dramatic version of the Work in motion picture form.

14. In and during the year 1943 the Author died. On May 22, 1952 — that date being during the year prior to the expiration of the original term of copyright — the United States Copyright in the Work was renewed in the name of plaintiff Hull, the sole surviving child of the Author.

15. A Certificate of Renewal Copyright was issued in the name of Cecil Winstanley Hull by the Registrar of Copyrights under Entry No. R: 95176 (a copy of which is annexed hereto as Exhibit C).

16. On May 6, 1965, plaintiff Hull, for a valuable consideration, sold, assigned and transferred to plaintiff Rohauer all of her "right, title and interest (if any)" in and to the motion picture and television rights of every kind and character in and to the Work throughout the world pursuant to an instrument in writing. The said assignment was duly registered in the Copyright Office on May 18, 1965 in Volume 1206 at pages 249-250 and a true copy thereof is annexed hereto as Exhibit D. Said Exhibit D contains the following parenthetical reference: "(the world motion picture rights in such literary property having been sold by Edith M. Hull in December, 1925 to Joseph H. Moscowitz)." Defendants reserve their rights to question the meaning and scope of said Exhibit.

17. Subsequent to the execution and delivery of Exhibit D, plaintiff Rohauer notified defendant Killiam of the existence thereof and of his claim that any showings of the Photoplay in the United States either theatrically or by means of television would constitute an infringement of his (Rohauer's) rights and would be an infringement of the United States renewal copyright in the Work owned by plaintiff Hull. A true copy of a letter

dated May 12, 1966 sent to Killiam by Rohauer's then attorney is annexed hereto as Exhibit E and Killiam acknowledges his receipt of that letter.

18. On July 13, 1971, a showing of the Photoplay by means of television took place over the facilities of Channel 13 owned and operated by defendant Broadcasting. Such showing, which was viewed by many thousands of viewers in the New York metropolitan area, occurred without any consent by, or license from, plaintiffs or either of them.

19. The showing of the Photoplay, which occurred over the facilities of Channel 13 on July 13, 1971 was made possible by a grant of $75,000 from defendant Bowery which underwrote the telecasting of the series of 12 motion pictures entitled "The Silent Years", of which it knew the Photoplay was a part.

20. Defendant Bowery extensively advertised the showing on Channel 13 of the program "The Silent Years", including the Photoplay, in the press, in public buses and in other media, in conjunction with its own name, prepared and gave away to its customers posters containing a blown up still portraying a scene from the Photoplay and used its own name on such "give-aways", and arranged to have its name shown on the television screens of viewers of the Photoplay, at the beginning and end thereof as the company whose financial aid had made the presentation of the programs possible.

21. The film or tape required for the exhibition of the Photoplay on the facilities of Channel 13 on July 13, 1971 was made by Broadcasting from a positive print of the Photoplay made available to defendant Broadcasting by defendant Shows, for a consideration, and the consideration so paid to defendant Shows was furnished to defendant Broadcasting by defendant Bowery.

22. Prior to the exhibition of the Photoplay by defendant Broadcasting on July 13, 1971 it was on notice of the claim on the part of plaintiff Rohauer that the same would infringe upon the exclusive motion picture and television rights in the work granted to him by plaintiff Hull. A copy of such notice dated July 12, 1971 is annexed hereto and marked Exhibit F. Broadcasting acknowledged receipt of such notice and responded thereto by letter dated July 16, 1971, a copy of which is annexed hereto as Exhibit G.

23. This action was instituted on or about September 22, 1971, a little over two months from the date on which the alleged infringing showing of July 13, 1971 took place.

24. Following the institution of this action, and on October 11, 1971 and October 16, 1971, two additional showings of the Photoplay over the facilities of Channel 13 took place. Both of these showings were part of the same underwriting by defendant Bowery and were made possible through the use of the filmed or taped material which defendant Broadcasting had manu-

factured from a positive print made available to it by defendant Shows for a consideration paid to defendant Shows.

25. The complaint herein is deemed amended and supplemented to include the two additional showings referred to in paragraph 24, and all of the defenses alleged in the answers of defendants shall likewise apply thereto.

26. Prior to the dates on which the two additional showings referred to in paragraph 24 took place, defendant Broadcasting was on written notice from plaintiff Rohauer that he objected to the same and a copy of such notice is annexed hereto as Exhibit H.

B. IN CONNECTION WITH DEFENDANTS' DEFENSES

27. The Photoplay was duly copyrighted by and in the name of Feature Productions, Inc., as assignee of Joseph Moskowitz on August 24, 1926 and a certificate of registration of the same was duly issued by the copyright office under entry number L 23046. Such copyright in the Photoplay was duly renewed by and in the name of Artcinema Associates,Inc. as the then proprietor of the copyright therein on March 18, 1954 and a certificate of registration of the same was duly issued by the Copyright Office under entry number R127185. A true copy of the Certificate of Renewal Registration is annexed hereto as Exhibit I.

28. By agreement dated September 14, 1961, between Art cinema Associates,Inc., Mrs. Emil Jensen and Walten & Co. Inc. as Sellers and Gregstan Enterprises Inc. (herein Gregstan) as Buyer, all of the right, title and interest of Sellers in and to the Photoplay, including the renewal copyright therein was acquired by Gregstan. A true copy of said agreement, which was duly recorded in the Copyright Office in Vol. 1305 at p. 243 et seq. is annexed hereto as Exhibit J.

29. Defendants Killiam Shows, Inc. and Killiam claim that, at some time subsequent to September 14, 1961, Gregstan assigned all of its right, title and interest in and to the Photoplay, including the renewal copyright therein, to defendant Killiam Shows, Inc. Although such assignment is not of record and no copy thereof has heretofore been made available to plaintiffs, no objection to the introduction of the same into evidence upon the trial of this action will be made upon the trial of this action.

30. Subsequent to 1952 and prior to 1965, plaintiff Rohauer exhibited, or caused to be exhibited for theatrical and non-theatrical purposes, positive prints of the Photoplay which he had purchased without restriction as to use from Emil Jensen, the President of Art Cinema Associates, Inc., the then copyright proprietor of the Photoplay and he (Rohauer), knew that others had likewise purchased from the said Jensen, and were using, similar positive prints, all without the consent of plaintiff Hull.

31. Prior to the showing on July 13, 1971 that is the subject of the complaint herein, the Photoplay had been extensively shown on television in the United States through defendant Killiam Shows, Inc. and its predecessors in interest controlled by defendant Killiam as part of the "Silents Please" series commencing in 1960 and continuing thereafter, and such showings were viewed by an audience that numbered in the millions.

32. The Photoplay was exhibited at various theatres in Great Britain during the year 1954 and was shown on television in Great Britain between 1962 and January 1966 as part of the "Silents Please" series pursuant to licenses granted by defendant Killiam Shows, Inc. or its predecessors in interest controlled by defendant Killiam.

33. There is no direct evidence that plaintiff Hull ever objected to the uses referred to in paragraphs 30, 31 and 32, or that she knew they were taking place.

34. Paul O'Brien, Esq., who wrote the letter dated May 12, 1966 (Exhibit E hereto), on behalf of plaintiff Rohauer, was the attorney who handled the renewal of the copyright in the Photoplay in 1954, and also acted as attorney for certain of the Sellers named in the agreement dated September 14, 1961 with Gregstan (Exhibit J hereto).

C. AS TO ALL PARTIES

35. The depositions of plaintiff Raymond Rohauer taken

on January 13, 1972, February 22, 1972 and March 17, 1973 (certified to by Simon A. Lubow, Certified Shorthand Reporter), of defendant Paul Killiam individually and on behalf of defendant Killiam Shows, Inc. taken on February 29, 1972 (certified to by Isadora S. Borak, Certified Shorthand Reporter), of Hudson G. Stoddard on behalf of defendant Educational Broadcasting Corporation taken on April 12, 1972 (certified to by George Abraham, Certified Shorthand Reporter), and of James Michael Shea on behalf of defendant The Bowery Savings Bank on May 19, 1972 (certified to by Bernard Jacobs, Notary Public), shall be deemed in evidence (even though the same have not been executed, sworn to or filed) and any party to this action may make use of the same upon the trial thereof, subject only to objections as to relevance.

36. All of the exhibits marked for Identification on any of the depositions referred to in paragraph 35 hereof may be used by any party to this action upon the trial thereof, subject only to objections as to relevance.

Dated: New York, New York
October , 1973

Attorneys for Plaintiffs

Attorneys for Defendants Killiam Shows Inc., Paul Killiam and Educational Broadcasting Corporation.

Attorneys for Defendant The Bowery Savings Bank

Act of March 4, 1909, 17 U.S.C. 215)

CLASS A XXc., NO. 855221

COPYRIGHT OFFICE
OF THE UNITED STATES OF AMERICA

THE LIBRARY OF CONGRESS :: WASHINGTON

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the BOOK named herein have been deposited in this Office under the provisions of the Act of 1909, together with the AFFIDAVIT prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of twenty-eight years for said book has been duly made in the name of

Small, Maynard & Co. Inc.
41 Mt Vernon St
Boston, Mass

Title: The Sons of the Sheik

By: E. M. Hull of Great Britain

Boston
Small, Maynard and Company

Printed or produced by Murray Printing Co., Cambridge, Mass

Date of publication in the United States May 15 1925
Affidavit received May 18 1925
Copies received May 18 1925

[SEAL]

ACTING REGISTER OF COPYRIGHTS

CCR 8
(Mar. 1967—1,000)

Copyright Office of the United States of America

THE LIBRARY OF CONGRESS
WASHINGTON

THIS IS TO CERTIFY THAT THE ATTACHED IS A TRUE COPY OF THE INSTRUMENT RECORDED IN THE COPYRIGHT OFFICE RECORDS OF ASSIGNMENTS AND RELATED DOCUMENTS VOLUME 136, PAGE(S) 97-98, ON JANUARY 13, 1926

IN TESTIMONY WHEREOF, THE SEAL OF THIS OFFICE IS AFFIXED HERETO ON JULY 26, 1970

SEAL

Certification B
(Jan. 1961—2,000)

Abraham L. Kaminstein
REGISTER OF COPYRIGHTS

OPO

WITH FOLLOWING TWO (2) PAGES

97

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA. ASSIGNMENTS OF COPYRIGHTS.

RECEIVED FOR RECORD December 26, 1925.

ASSIGNOR : EDITH M. HULL

ASSIGNEE : JOSEPH H. MOSKOWITZ

AGREEMENT, made this 7th day of December, 1925, between EDITH M. HULL, of London, England, hereinafter called the "Seller" and JOSEPH H. MOSKOWITZ, Of New York City, hereinafter called the "Purchaser".

WITNESSETH :

FIRST: The Seller hereby represents :

That she is the sole owner of the motion picture rights throughout the world in and to a certain story entitled "Sons of the Sheik", written by her; that said story is wholly original with her, and that no part thereof infringes upon the copyright, common law rights or the literary, dramatic or motion picture rights of any person whomsoever; that said story was first published in the United States by Small, Maynard & Company in the year 1925, and duly registered for copyright in the Register's Office in the name of Small, Maynard & Company (Inc), on the 18 day of May, 1925 under No. 22221 Class A.XEa ; that she has heretofore granted no right, title or interest in or to the said story or in or to the right to dramatize or perform the same adverse to or inconsistent with the rights hereinafter granted to the Purchaser; that the said motion picture rights in and to said work have in no way been conveyed, granted, encumbered, restricted, hypothecated or otherwise disposed of, and that she has full right to make this assignment to the Purchaser hereunder.

SECOND : The Seller hereby grants, sells and assigns to the Purchaser all the motion picture rights in and to the said story for the entire world, together with the sole and exclusive right to make motion picture versions thereof and to use, adapt, add to, subtract from and change said story and the title thereof in the making of said motion picture photoplays, as the Purchaser may deem expedient, to use excerpts from such story for the title, subtitles and text of such motion picture versions, and to secure copyright and copyright registration therein in the Purchaser's name or otherwise in all countries, and to vend, exhibit, exploit and distribute copies of the same.

THIRD: The Seller agrees prior to the expiration thereof, to renew or procure the renewal of the copyright in said story and thereupon to assign to the Purchaser and the Purchaser shall be entitled to receive with the motion picture rights therein for such renewal term.

FOURTH: The Purchaser agrees, in connection with the film and in his paid advertising of the photoplays and photoplaybooks made pursuant thereto that same are based upon or adapted from said story written by the Seller or words to that effect, except where the name of such photoplay shall be published with the names of other photoplays in group or list advertising, the Seller's name need not be mentioned in connection therewith.

FIFTH: The Seller hereby agrees to provide the Purchaser with any additional docu-

The foregoing assignment of copyright is this ..... day of ..... Office of the United States, book ....., page ....., in conformity with the law. Written ..... Revised .....

Please see page 17-a A for transcript of paragraphs SECOND, THIRD and FOURTH.

BEST COPY AVAILABLE

Transcript of paragraphs SECOND, THIRD and FOURTH
from preceding page 17 A

SECOND: The Seller hereby grants, sells and assigns to the Purchaser all the motion picture rights in and to the said story for the entire world, together with the sole and exclusive right to make motion picture versions thereof and to use, adapt, add to, subtract from and change said story and the title thereof in the making of said motion picture photoplays, as the Purchaser may deem expedient, to use excerpts from such story for the title, sub-titles and text of such motion picture versions, and to secure copyright and copyright registration therein in the Purchaser's name or otherwise in all countries, and to vend, exhibit, exploit and otherwise dispose of the same.

THIRD: The Seller agrees prior to the expiration thereof, to renew or procure the renewal of the copyrights in said story and thereupon to assign to the Purchaser and the Purchaser shall be deemed to be vested with the motion picture rights thereto for such renewal term.

FOURTH: The Purchaser agrees to announce on the film and in his paid advertising of the motion picture photoplays made pursuant hereto that same are based upon or adapted from said story written by the Seller or words to that effect, except where the name of such photoplay shall be published with the names of other photoplays in group or list advertising, the Seller's name need not be announced in connection therewith.

98

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA.

ASSIGNMENTS OF COPYRIGHTS.

RECEIVED FOR RECORD

ASSIGNOR ,

ASSIGNEE ,

ment or documents necessary or proper to secure the rights hereby granted and receipt the record thereof.

SIXTH : The Seller hereby grants to the Purchaser the right to copyright and publish in his own name or otherwise, synopses and scenarios , not exceeding fifteen hundred words in length, of any motion picture photoplays to be made pursuant hereto and based on said story, such publication to be made in what is known in the trade as press books, show notices, heralds and trade journals.

SEVENTH : The Seller agrees to defend, indemnify, make good and hold harmless, the Purchaser, his heirs, executors, administrators and assigns against any loss, damage, and expense which the Purchaser or his heirs, executors, administrators and assigns may suffer, incur or assume by reason of the breach of any of the foregoing warranties.

EIGHTH : In full consideration for the rights hereby granted, the Purchaser agrees to pay the Curtis Brown, Ltd., agent for the Seller, the sum of $21, 000.00 upon the execution hereof, receipt whereof is hereby acknowledged.

NINTH: This agreement shall bind and ensure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have duly executed these presents, the day and year first above written.

Edith M. Bull (L. S.)

Joseph H. Mackenzie (L. S.)

GREAT BRITAIN AND IRELAND,
LONDON, ENGLAND, } SS:
CONSULATE GENERAL OF THE UNITED STATES OF AMERICA,)

On this 7th day of December, 1926, before me personally came EDITH M. BULL, to me known and known to me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

American
Consular Service
$2
Fee Stamp

Consulate General
7-Dec.1926
U. S. A. London
18270

SEAL

Russell H. Bleiler
Vice Consul of the United States of America
London, England

The foregoing agreement of copyright is this thirteenth day of January, 1927, recorded in the Copyright Office of the United States, book 188, page 87-88, in conformity with the laws of the United States respecting copyright.

Written LAL. Revised PAR

PAGE 1a

Additional Certificate (17 U.S.C. 215) 19 A

CERTIFICATE OF REGISTRATION
OF A CLAIM TO THE RENEWAL OF A COPYRIGHT

REGISTRATION NO. R 95176 FORM R

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Abraham L. Kaminstein

Register of Copyrights
United States of America

1. NAME OF CLAIMANT OR CLAIMANTS OF THE RENEWAL COPYRIGHT:

(a) CECIL WINSTANLEY HULL (Name), c/o NATIONAL PROVINCIAL BANK Market Place, Derby, England (Address)

claiming as child of the deceased author
(See instructions on page 2a)

(b) _____ (Name), _____ (Address)

claiming as _____

(c) _____ (Name), _____ (Address)

claiming as _____

2. COMPLETE TITLE OF WORK THE SONS OF THE SHEIK
(Including specific instrumentation in the case of music)

3. NAMES OF ALL AUTHORS OF RENEWABLE MATTER:

EDITH M. HULL

4. FACTS OF ORIGINAL REGISTRATION:

Original registration number. CLASS A xxc. No. 855221

If registered as published May 15, 1925
(Give date of publication)

If registered as unpublished _____
(Give date)

Original copyright claimant SMALL, MAYNARD & COMPANY, INC.
(Name of claimant in original registration)

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name DODD, MEAD & COMPANY, INC.

Address 432 Fourth Avenue
(Number and street)

New York (City) 16 (Zone) N.Y. (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE
APPLICATION MAY 22 1952
FEE

16—62830-1

6. Name _____ Address _____

PERSONS WHO ARE ENTITLED TO CLAIM THE RENEWAL COPYRIGHT

When the author is living and application is made by or for him, the words "the author" should be inserted in the blank left for that purpose in item 1 (on pages 1 and 1*a*) after the words "claiming as."

If the author is not living and application is made by:

(*a*) the widow or widower, then the words "the widow of the author" or "the widower of the author" should be inserted after the words "claiming as."

(*b*) the child or children of the deceased author, then the words "the child of the deceased author" or "the children of the deceased author" should be inserted after the words "claiming as."

(*c*) the executors of the will of the author, then the words "the executors of the author" should be inserted after the words "claiming as."

(*d*) the next of kin of the author, then the words "the next of kin of the author, who is not living, there being no will," should be inserted after the words "claiming as."

Renewal registration may be made by the "proprietor" under the following conditions, and in such cases the form of claim (to be given in item 1 of the renewal application and certificate after the words "claiming as") MUST be substantially in the form shown below:

1. If the work is posthumous or composite and if the copyright has been secured originally by the proprietor thereof, the present proprietor may renew as:
   (*a*) "Proprietor of the posthumous work."
   (*b*) "Proprietor of the composite work."

2. If the work has been copyrighted by a corporate body otherwise than as assignee or licensee of the individual author, the proprietor may renew as:
   "Proprietor of a work copyrighted by a corporate body otherwise than as assignee or licensee of the author."

3. If the work has been copyrighted by the employer for whom such work was made for hire, the proprietor may renew as:
   "Proprietor of copyright in a work made for hire."

4. If the work is a print or label used for articles of merchandise, the present proprietor may renew as "the proprietor." (Use application Form RR.)

* * * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF CLAIMS TO RENEWAL COPYRIGHT

The copyright law provides that a renewal copyright may be obtained when application for such renewal shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright. The original copyright term is 28 years, which for a published work begins on the date of publication, and in the case of a work originally registered as unpublished, commences on the date of registration. Hence, the application for renewal copyright must be received in the Copyright Office in acceptable form within the last year of the first term of 28 years, measured from the exact date on which the original copyright began. It is advisable, therefore, to submit the application and fee well in advance of the expiration date of the original term to permit the filing of a new application if the one first received is not acceptable. All renewals are for an additional term of 28 years. The application Form R should be sent with the registration fee of $2 to the Register of Copyrights, Library of Congress, Washington 25, D. C. It is not necessary that copies of the work be again deposited.

U. S. GOVERNMENT PRINTING OFFICE 16—63830-1

Copyright Office of the United States of America

THE LIBRARY OF CONGRESS

WASHINGTON

THIS IS TO CERTIFY THAT THE ATTACHED INSTRUMENT WAS RECORDED IN THE COPYRIGHT OFFICE RECORDS OF ASSIGNMENTS AND RELATED DOCUMENTS ON THE DATE AND IN THE PLACE SHOWN BELOW.

IN TESTIMONY WHEREOF THE SEAL OF THIS OFFICE IS AFFIXED HERETO.

Abraham L. Kaminstein
REGISTER OF COPYRIGHTS

Date of Recordation
13May65

Volume 1206

Pages 249-250

SEAL

CERTIFICATION A (FEB. 1965 20,000)

EXHIBIT D

WITH FOLLOWING TWO (2) PAGES

VOL 1206 PAGE 249

ASSIGNMENT

For and in consideration of the sum of £146.10s.0d. receipt of which is hereby acknowledged, the undersigned Cecil Winstanley Hull, the only surviving child of Edith M. Hull, does hereby sell, assign and set over unto Raymond Rohauer all the undersigned's right, title and interest (if any) in and to the motion picture and television rights of every kind and character throughout the world and in all languages in a certain literary and/or dramatic property entitled "SONS OF THE SHEIK", by Edith M. Hull, which was originally copyrighted in the United States by Small, Maynard & Company, Inc., May 15, 1925, under entry No. A: 855221, with such copyright being renewed in the name of Cecil Winstanley Hull, May 22, 1952, under entry No. R: 95176 (the world motion picture rights in such literary property having been sold by Edith M. Hull in December 1925 to Joseph H. Moskowitz).

Without limiting the foregoing, the rights herein conveyed to Raymond Rohauer shall include any and all rights (if any) which the undersigned may own in a certain motion picture photoplay entitled "SON OF THE SHEIK" starring Rudolph Valentino, which was copyrighted by Feature Productions Inc, August 24, 1926, under entry No. LP: 23046, including all of the undersigned's right (if any) to remake said motion picture.

The undersigned further agrees to execute further instruments or assurances as may be necessary to effectuate the transfer of the rights made herein.

Nothing herein contained shall be deemed a warranty as to the ownership of the right title and interest herein conveyed save that the undersigned Cecil Winstanley Hull represents and warrants that to the best of her knowledge she has personally granted no rights to any of the said property entitled "SONS OF THE SHEIK" to anyone whatsoever and the said Raymond Rohauer shall keep the said Cecil Winstanley Hull indemnified against all proceedings claims and expenses however arising from the terms of this deed.

Signed and Sealed this Sixth day of May 1965.

Witnesseth:

R. D. Stanton
Patrick
Notary Public

Cecil W. Hull
Cecil Winstanley Hull.

VOL 1206 PAGE 250

KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND)
CITY OF EDINBURGH, SCOTLAND) ss:
CONSULATE OF THE UNITED STATES OF AMERICA)

I, J. Phillip McLean, Vice Consul of the United States of America residing in Edinburgh, Scotland, duly commissioned and qualified, do hereby certify that

"R.W. SHEPHERD"

whose signature and official seal are, respectively, subscribed and affixed to the annexed certificate, was on the date of signing thereof a Notary Public practising at Penrith, Cumberland, England ---------- duly authorized to perform notarial acts, duly appointed and qualified to whose official acts faith and credit are due; and that I have compared the signature of the said

"R.W. SHEPHERD"

the annexed certificate with a specimen of his signature filed in this Consulate; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed this Consulate and that I believe the impression of the seal upon the original annexed certificate to be genuine.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the Consular Service of the United States of America at Edinburgh, Scotland this 7th day of May in the year of our Lord one thousand nine hundred and sixty five.

J. Phillip McLean
Vice Consul of the United States of America at Edinburgh, Scotland.

May 12, 1966

William-Sterling Film Collection
6 East 39th Street
New York, N. Y., 10016

Re: "Son of the Sheik" - Entertainment Films
Walter Reade-Sterling

Att: Mr. Paul Killiam, President

Dear Mr. Killiam:

Please be advised that I have before me an Assignment, dated May 6, 1965, from the only surviving child of Edith M. Hull, Cecil Winstanley Hull to Raymond Rohauer, of Cecil Hull's right, title and interest in and to the Motion Picture and Television rights of every kind and character throughout the world and in all languages, in a certain literary and/or dramatic property entitled "Sons of the Sheik" by Edith M. Hull of the original copyright, such copyright having been renewed in the name of Cecil Winstanley Hull on May 22, 1952, under Entry #R95176, and that such assignment includes "any and all rights (if any), which the undersigned may own in a certain motion picture photoplay entitled 'Sons of the Sheik', starring Rudolph Valentino, which was copyrighted by Feature Productions, Inc. on August 24, 1926, under entry #LP3046, including all of the undersigned's right (if any) to remake said motion picture."

This assignment was registered in the Copyright Office of the United States of America, in Volume 1206, Page 249, on May 18, 1965.

Mr. Fulton Brylawski, Esq., of Washington, D. C., has advised us that no one can license or exhibit the motion picture "Sons of the Sheik" without a license to use the basic property from Raymond Rohauer. Our investigation of the facts leads us to the conclusion that Mr. Brylawski's opinion is correct.

Very truly yours,

PDO:ir

Paul D. O'Brien

cc: Raymond Rohauer

Rec'd 7/14

Plfs Ex 6 Ad
4-12-72
BA

MAX H. GALFUNT

COUNSELOR AT LAW

—

COLUMBUS 5-1115

165 WEST 46TH STREET
NEW YORK, N. Y. 10036

July 12, 1971

National Educational Television
10 Columbus Circle
New York, New York 10019

Re: ROHAUER v. NET

Gentlemen:

I represent Mr. Raymond Rohauer who is the owner of the copyright of the literary work entitled "Sons of The Sheik," on which the photoplay "The Son of The Sheik" is based. This copyright has been renewed in the United States and is fully protected under the Bern Convention throughout the world.

I note an advertisement that you will televise the photoplay "The Son of The Sheik: on Tuesday, July 13, 1971. Any televising or any exhibition in any form whatsoever or through any media shall be a copyright infringement in which your entire network will be held liable.

I hereby notify you to cease and desist from any use of this photoplay without the written consent of my client.

Will you please advise me who licensed the above photoplay, and with what authority you are televising same.

Very truly yours,

Max H. Galfunt

MAX H. GALFUNT

MHG:vk

WNET
EDUCATIONAL BROADCASTING CORPORATION / 304 WEST 58TH STREET / NEW YORK 10019 / 581-6000

Ltr. Bowery Sav. T
Feb 22, 72
RG

July 16, 1971

Max H. Galfunt, Esq.
165 West 46th Street
New York, New York

RE: THIEF OF BAGHDAD and
SON OF THE SHIEK

Dear Mr. Galfunt:

We are in receipt of your letters dated July 12 and July 13 regarding alleged claims in connection with the two films referred to above.

Please be advised that WNET obtained license to broadcast the films referred to above from Killiam Shows, Inc. Pursuant to this license agreement, Killiam Shows, Inc. warranted and represented that they had all rights necessary to grant WNET noncommercial broadcast rights and specifically agreed to indemnify WNET against any claims arising from our broadcast.

Very truly yours,

Stephen A. Glauber
General Counsel

SAG:aa

cc: The Bowery Savings Bank
Killiam Shows, Inc.

Plf's Ex 7 dd
4-12-72 SA

SCHWARTZ, MERMELSTEIN, BURNS, LESSER & JACOBY
445 PARK AVENUE NEW YORK 10022

(212) 980-3200

MILTON E. MERMELSTEIN
ARTHUR H. SCHWARTZ
ARNOLD I. BURNS
STANLEY T. LESSER
HERBERT P. JACOBY
MORTIMER N. FELSINGER
STANLEY GARRETT
EVERETT A. FROHLICH
ERWIN CHEROVSKY
STUART G. SCHWARTZ
SHELDON W. HALPERN
MICHAEL S. FAWER
JOHN L. AMABILE
HARVEY FRANK
HERBERT F. FISHER
LAWRENCE C. GIBBS
JEFFREY A. MOROSS

NATHAN BURKAN
(1900-1916)
SCHWARTZ & FROHLICH
(1936-1970)

CABLE: "MERMLAWS"

October 6, 1971

Educational Broadcasting Corporation
304 West 58th Street
New York, New York 10019

Attention: Stephen A. Glauber, Esq.

Re: Rohauer, et ano vs.
Killiam Shows, Inc. et al
("The Son of the Sheik")

Gentlemen:

The above entitled action, in which it is alleged that any exhibition in the United States of the motion picture "The Son of the Sheik" is an infringement of the renewal copyright for the book on which that motion picture was based, is now pending in the United States District Court for the Southern District of New York, and service of the summons and complaint has been made upon you.

According to trade publications such as TV Guide, you have scheduled a further exhibition of the subject motion picture for Monday, October 11 and a repeat showing on October 16. A telephone call made by the undersigned to your counsel has confirmed that it is your intention to proceed with such exhibitions notwithstanding the pending lawsuit.

While it is my understanding that the showing of the picture "The Son of the Sheik" which took place over the facilities of Channel 13 last July occurred after receipt of notice of its infringing character, there certainly could be no doubt that the contemplated showings on October 11 and October 16 will be willful and intentional violations of the rights of the plaintiffs in the subject action should they prevail upon the trial thereof.

SCHWARTZ, MERMELSTEIN, BURNS, LESSER & JACOBY

October 6, 1971

This letter is to put you on formal notice of the fact that you will be proceeding with all such showings at your own risk and that all of the rights of the plaintiffs to seek redress for the same are expressly reserved.

Very truly yours,

Herbert P. Jacoby

HPJ:mmc

cc: Cadwalader, Wickersham & Taft
One Wall Street
New York, New York 10005
Attention: Jacquelin A. Swords, Esq.

PAGE 1a

Official Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION
OF A CLAIM TO THE RENEWAL OF A COPYRIGHT

REGISTRATION NO. R 127185

FORM R

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Abraham L. Kaminstein
Register of Copyrights
United States of America

1. NAME OF CLAIMANT OR CLAIMANTS OF THE RENEWAL COPYRIGHT:

(a) ARTCINEMA ASSOCIATES INC. (Name), 729 Seventh Avenue, New York. N. Y. (Address)

claiming as "Proprietor of copyright in a work made for hire." (See instructions on page 2a)

(b) _____ (Name), _____ (Address)

claiming as _____

(c) _____ (Name), _____ (Address)

claiming as _____

2. COMPLETE TITLE OF WORK "THE SON OF THE SHEIK" (Including specific instrumentation in the case of music)

3. NAMES OF ALL AUTHORS OF RENEWABLE MATTER:

Feature Productions Inc.

4. FACTS OF ORIGINAL REGISTRATION:

Original registration number. CLASS L xxc. No. 23046

If registered as published August 24, 1926 (Give date of publication)

If registered as unpublished _____ (Give date)

Original copyright claimant Feature Productions, Inc. (Name of claimant in original registration)

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name O'Brien, Driscoll & Raftery

Address 152 West 42nd Street (Number and street)

New York (City) 36 (Zone) New York (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE

APPLICATION MAR 18 1954

FEE 2.00

86414 Dec 14 '53

6. Name _____ Address _____

Copyright Office of the United States of America

THE LIBRARY OF CONGRESS

WASHINGTON

THIS IS TO CERTIFY THAT THE ATTACHED INSTRUMENT WAS RECORDED IN THE COPYRIGHT OFFICE RECORDS OF ASSIGNMENTS AND RELATED DOCUMENTS ON THE DATE AND IN THE PLACE SHOWN BELOW.

IN TESTIMONY WHEREOF THE SEAL OF THIS OFFICE IS AFFIXED HERETO.

Abraham L. Kaminstein
REGISTER OF COPYRIGHTS

Date of Recordation
10May68

Volume
305

Pages
243-249

SEAL

TIFICATION A (AUG. 1966 20,000)

EXHIBIT J
WITH FOLLOWING EIGHT (8) PAGES

VOL 1305 PAGE 243 JENSEN "A"
ONJ

THIS AGREEMENT made and entered into this 14th day of September, 1961, by and between ART CINEMA ASSOCIATES, INC., MRS. EMIL JENSEN, care of O'Brien, Driscoll & Raftery, Esqs., 152 West 42nd Street, New York, New York, and WALTON & CO., INC., care of Shearman & Sterling, Esqs., 20 Exchange Place, New York, New York (hereinafter referred to as "SELLERS") and GREGSTAN ENTERPRISES, INC, care of Theodore R. Kupferman, Esq., 500 Fifth Avenue, New York 36, New York (hereinafter referred to as "BUYER").

WHEREAS, the Sellers are the sole owners of all the right, title and interest in the motion pictures set forth in Schedule "A" attached hereto (hereinafter referred to as "FILMS") and certain rights in the stories and literary property set forth in Schedule "B" (hereinafter referred to as "LITERARY PROPERTY"), and

WHEREAS, pursuant to an agreement dated September 30, 1953, as amended, Art Cinema Associates, Inc. licensed certain rights in said Films and Literary Property to Milton M. Gettinger and Kenneth Hyman (hereinafter referred to as "LICENSEES"), and

WHEREAS, Sellers have certain claims and causes of action against Licensees and other persons, firms and corporations

in connection therewith and by reason of the aforesaid agreement or otherwise,

NOW, THEREFORE, in consideration of the premises and the respective covenants and conditions hereinafter set forth, the parties hereto agree as follows:

1. The Sellers do hereby sell, assign and transfer to the Buyer all of their right, title and interest in and to the Films set forth in Schedule "A" and the Literary Property set forth in Schedule "B", and in any version or versions thereof, and in and to all copyrights, both common law and statutory, renewal copyrights and all rights of any kind including all rights in the titles of said Films and all rights in the negatives and prints thereof, in the United States and throughout the world, including all claims and causes of action of any kind with respect thereto against any person, firm or corporation which have accrued prior to the date hereof at any time or which may hereafter accrue.

2. The Sellers further covenant and agree to execute any additional documents, instruments or papers confirmatory of the assignment and the rights transferred.

3. The Sellers warrant and represent that they have the right to make this agreement and to convey the rights provided for in this agreement.

4. The Sellers agree to cooperate fully with the

Buyer and to use their best efforts to secure to the Buyer the full rights sold, assigned and transferred hereunder.

5. The Sellers will turn over to Buyer all files in their possession with reference to the Films and the Literary Property including, but not limited to press books and documents of title and ownership. All contracts and correspondence with Licensees or their agents, attorneys and assignees or sub-licensees shall also be delivered to Buyer.

6. In full payment for the rights transferred hereunder, Sellers shall receive -

(a) Two thousand ($2,000.00) Dollars for each one of the films set forth in Schedule "A" (except for "Son of the "Sheik")) that is actually used in a television film series entitled "Silents Please"; and

(b) Fifty (50%) percent of all net sums actually received by Buyer from any other source involving the Films or Literary Property, including any claim or causes of action arising thereunder or arising prior to this agreement.

7. As an advance against the sums due under paragraph "6 (a) or (b)", Sellers shall receive Five thousand ($5,000.00) Dollars on the signing of this agreement, receipt of which is hereby acknowledged, and Five thousand ($5,000.00) Dollars on October 16, 1962 and Five thousand ($5,000.00) Dollars on October 16, 1963.

If any payments are made prior to the time advances are due, then such payments shall be a credit toward the payments or any part thereof due on October 16, 1962 and October 16, 1963.

8. Accountings together with payments due hereunder shall be made in 1962 and 1963 on a semi-annual basis, and thereafter, at the Buyer's option, either semi-annually or within three months after amounts in excess of One thousand ($1,000.00) Dollars are due, to the date of the accounting, but in no event shall there be less than one a year.

9. Buyer will keep full and accurate books and records of its operations with respect to the Films and Literary Property consistent with sound business and accounting practices, in such form and in such detail as to enable the payments to be made to Sellers hereunder to be determined. Buyer will permit yearly inspection of such books and records by an accounting firm chosen by Sellers, as an independent auditor, who will report to the Sellers, with a copy of such report to be given by the Sellers to the Buyer. Such inspection shall be at reasonable times during the business day, at the office of the Buyer. If the accounting firm chosen by Sellers also works for a competitor of Buyer then it must be a National accounting firm.

10. In the event of a material default by Buyer in complying with the terms of paragraph "6", "7" and "8" hereunder, then the Sellers shall have the right to terminate this agreement as follows: The Sellers shall first give buyer sixty (60) days' notice by registered mail of the default or defaults involved, and in the event of the failure of Buyer during that period either (a) to remedy the default, or (b) to commence an action in the courts of the State of New York, New York County, to determine the validity of its action or inaction, then the Sellers shall have the right to terminate this agreement forthwith by registered mail notice to that effect.

A waiver by Sellers of one or more defaults shall not be a waiver of a subsequent default.

For the purpose of the court action referred to above, registered mail notice to Sellers care of their attorneys, O'Brien, Driscoll & Raftery and Shearman & Sterling shall be the equivalent of and in place of personal service.

11. Buyer agrees to take steps to enforce the rights, both past and present, of Sellers in the agreement of September 30, 1953 as amended.

12. Nothing herein contained will constitute a partnership or a joint venture by the parties hereto, or constitute any part the agent of the other.

IN WITNESS WHEREOF, the parties hereto have here-

VOL 1305 PAGE 247

unto set their hands and seals the day and year first above written.

ART CINEMA ASSOCIATES, INC.

by Mrs. Edna Jensen

Mrs Emil Jensen

Mrs. Emil Jensen, individually and on behalf of the Estate of Emil Jensen

WALTON & CO., INC.

by _____
President

GREGSTAN ENTERPRISES, INC.

by _____
Pres.

SCHEDULE "A"

13 PICTURES

Recorded in Copyright Office on April 30, 1937.

TITLE	BOOK NO.	PAGES
LOTTERY BRIDE	373	38-39
THE BAD ONE	373	42-43
CORSAIR	373	52-53
DuBARRY	373	54-55
REACHING FOR THE MOON	373	26-27
INDISCREET	373	6-7
PUTTIN ON THE RITZ	373	10-11
ABRAHAM LINCOLN	373	36-37
BE YOURSELF	373	46-47
NEW YORK NIGHTS	373	2-3
SON OF THE SHIEK	373	30-31

BIG HOUSE FOR GIRLS (SILVER LINING) August 14/31 - L.P. 3011

SCHEDULE "B"

ARTCINEMA STORIES

THE MIDNIGHT KING	Albin Michel	never produced
HIS FIRST COMMAND	John Farrow	"
THE BRONZE COLLAR	John Frederick	"
THE FUGITIVE	Max Brand	"
BLIND RAFTERY	Donn Byrne	"

CONT'D

CONT'D

KEY TO PARADISE	C.Gardiner Sullivan	"
SEA DOGS	Ralph Spence	"
THE SON OF THE SHIEK	Edith M. Hull	music added silent negative in existence
THE GARDEN OF EDEN	Rudolph Bernauer Rudolph Oestricher	silent negative in existence
REVENGE (THE BEARTAMERS DAUGHTER)	Konrad Bercovici	"
EYES OF YOUTH (SUNYA)	Charles Guernon Max Marchin	"
THE BATTLE OF THE SEXES	Daniel Carson Goodman	"
THE TEMPEST	C.Gardiner Sullivan	"
THE LOTTERY BRIDE	Herbert Stothart	Sound negative in existence
THE BAD ONE	Howard Emmett Rogers	"
CORSAIR	(Liberty Magazine) Walter Green	"
DuBARRY	Play by David Belasco	"
REACHING FOR THE MOON	Edmund Goulding	"
INDISCREET	De Sylva Brown Henderson	"
PUTTIN' ON THE RITZ	John Consadine, Jr.	"
ABRAHAM LINCOLN	Stephen Vincent Benet	"
THE CHAMP (BE YOURSELF)	Joseph Jackson	"
TIN PAN ALLEY (NEW YORK NIGHTS)	Hugh Stanislaus Stange	"
BIG HOUSE FOR GIRLS (THE SILVER LINING)	Hal Conklin	"

39 A

DEFENDANT'S EXHIBIT "C"
PLUS NEXT SEVEN PAGES

DEFENDANT

Killiam

NOV 5 1973

The British Film Institute

81 Dean Street, London W1V 6AA

Telephone 01-437 4355
Telegrams/Cables: Brifilmst London W1
Telex 27624

Chairman: Denis Forman
Director: Keith Lucas
Deputy Director: Alan Hill
Secretary: Vernon Saunders

Paul Killiam
Killiam Shows Inc
New York

July 2, 1973

Dear Paul,

This is a hasty note to enclose some documents which you may have, but could have been omitted from earlier correspondence.

I hope things are going well

Best regards,

Sincerely

Cyrus

& CABLES)

JOYNSON-HICKS & CO.
INCORPORATING WIGAN & CO
SOLICITORS.

THE VISCOUNT BRENTFORD

J D HASLAM
G A BERNHARD
C C WALKER
D G LONGDEN
THE HON C W JOYNSON HICKS
IAN GOW
G C CLEVERLY
J H MAX-MULLER
ROSINA HARRIS
G F OAKLEY
C O FRASER
R W ELLIS
M L G DILLON

CONSULTANT
A R REES-REYNOLDS, C.B.E.

LENNOX HOUSE,
NORFOLK STREET STRAND
ENTRANCE IN HOWARD ST.
LONDON, WC2R 2HL

ALSO AT -
WETTERN HOUSE, 56 DINGWALL ROAD, CROYDON
TELEPHONE 01-686 4831

PLEASE QUOTE
OUR REFERENCE A/V

YOUR REFERENCE PJS/CE

16th November, 1970.

Dear Mr. Strick,

"Son of the Sheik".

I write to confirm our telephone conversation on Thursday last week. I confirm that Mr. Rohauer is willing to allow the "Son of the Sheik" screening at Sheffield on January 8th next, upon the same conditions as hitherto:-

1. 25% of the takings.

2. The showing of the following notice in all publicity, programme notes, posters, etc.

"By special arrangement with Raymond Rohauer, copyright owner".

As mentioned to you, it is also a condition of Mr. Rohauer's consent that the B.F.I. will make a 35mm. dupe negative from the print in their possession, together with a 35mm. release print, both of these to be at the cost of Mr. Rohauer.

I should be grateful if you would kindly confirm to me in writing your verbal confirmation over the 'phone.

....

I should be grateful if you could pass on the contents of this to Mr. Heath as I have been dealing with him up to this stage.

Finally, I look forward to hearing from you with the details of the Lancaster showing.

Yours sincerely,

A.T. Lewis.

Philip Strick, Esq.,
The British Film Institute,
81 Dean Street,
London, W1V 6AA.

8 January 1971

Mr. A.M. Lewis,
Joynson-Hicks & Co.,
Lennox House,
Norfolk Street,
Strand.

Dear Mr. Lewis,

SON OF THE SHEIK

This is to confirm that negative cutting of the 35mm negative and print of this subject has now been completed by us on your behalf and we await your instructions as to where you would like it delivered.

Yours sincerely,

Philip Strick
Head of Film Distribution

DELIVERY NOTIFICATION ORDER

To: Mr. Philip Strick

From: Distribution Department Date: 6th January, 1971.

ORDER NO	TITLE AND DESCRIPTION	DELIVERED BY
6095	SON OF THE SHEIK 1 x 35mm B/W Mute F.G. Dupe Negative 1 x 35mm B/W Mute Print	Brent Laboratories Ltd.

PLEASE STATE ACTION REQUIRED AND RETURN TO DISTRIBUTION DATE:

ORDER COMPLETE

& CABLES)

JOYNSON-HICKS & CO.
INCORPORATING WIGAN & CO.
SOLICITORS.

THE VISCOUNT BRENTFORD

J. D. HASLAM — O. C. CLEVERLY
O. A. BERNHARD — J. H. MAX MULLER
C. C. WALKER — ROSINA HARRIS
D. O. LONGDEN — O. F. OAKLEY
THE HON. C. W. JOYNSON-HICKS — C. O. FRASER
IAN GOW — R. W. ELLIS

CONSULTANT
A. R. REES REYNOLDS, C.B.E.

LENNOX HOUSE,
NORFOLK STREET STRAND
ENTRANCE IN HOWARD ST.,
LONDON, W.C.2.

ALSO AT:-
WETTERN HOUSE, 56 DINGWALL ROAD, CROYDON
TELEPHONE 01-686 4631

PLEASE QUOTE
OUR REFERENCE A/AML

YOUR REFERENCE pjs/jj

6th May, 1970.

Dear Sirs,

"Son of the Sheik".

We thank you for your letter of the 20th April. We must repeat our request for details of the basis upon which the public were admitted to showings of the film at Bristol. As you are aware, even if the film was only shown to members of the Film Society, and even if no charge was made for admission, there has still been a public performance which infringes our Clients' copyright. We must ask you to provide copies of the receipts from the Bristol showing.

Turning from the above particular infringement to the general matter of our Clients' copyright in "Son of the Sheik", we are most concerned at the prospects of future infringements and we must ask for your categorical assurance that future showings of the film will not be allowed without contacting us for licence beforehand.

We must also ask by what right you hold the print or prints of "Son of the Sheik" and from what source you obtained these.

Yours faithfully,

Joynson-Hicks & Co.

The British Film Institute,
81 Dean Street,
London, W1V 6AA.

Attn.: Philip Strick, Esq.

The British Film Institute
81 Dean Street London W1
01-437 4355

FILM ORDER

No 6095

To Brent Laboratories Ltd.,
North Circular Road, Cricklewood, N.W.2.

Please supply

From 35mm sound print SON OF THE SHEIK
being provided by us

1. One x 35mm dupe negative (silent)

2. One x 35mm print (silent) from the dupe negative

Please supply on 35mm cores and in cans

Transcript of the above:

From 35mm sound print SON OF THE SHEIK
being provided by us

1. One x 35mm dupe negative (silent)

2. One x 35mm print (silent) from the dupe negative

Please supply on 35mm cores and in cans.

Deliver to Mr.Fairbrother, 42/43 Lower Marsh, S.E.1.

Enquiries to Philip Strick, 437-4355

Invoices to
please quote Order Number on invoices and in all communications
Finance Officer, BFI

Signature [signature] **Date** 23rd Dec.1970

INVOICE INSTRUCTIONS	Goods Received	Budget Number
Reinvoice at cost plus 20% to: Jaymson-Hicks & Co., Lonnon House,	date signed	F3/11.6
	Cleared to Accounts date 5/1/71	Estimated Cost

BRITISH
FILM
INSTITUTE

CONSIGNMENT NOTE

DATE: 8th JAN.19..

FROM: .....LOWER.MARSH..... (Department)

at: ..... (Address)

Blue: With goods (Return to s
Pink: To driver/receptionist
Yellow: Kept by sender

DETAILS OF FILMS/GOODS (Delete as appropriate)

1 x 35mm Dupe Neg
1 x 35mm Print.
SON OF THE SHEIK

DELIVER TO: MR.RAYMOND ROHAUER
.....
COLLECTED BY JOYNSON-HICKS & CO.
.....

GOODS RECEIVED BY:
.....
DATE RECEIVED:
.....

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
FEB 7 - 1974
R. E. LONGST
CLERK, U. S. DIST

RAYMOND ROHAUER and CECIL W. HULL,

Plaintiffs,

vs.

THE EASTIN-PHELAN CORPORATION,

Defendant.

CIVIL NO. 72-25-D

ORDER DISMISSING COMPLAINT

Pursuant to Order of Court all matters pending in the above entitled cause came on for hearing at 4:30 p.m. January 30, 1974 in the U.S. Court House in Davenport, Iowa. The most important matters pending were defendant's motion for sanctions under Federal Rule of Civil Procedure 37 against Rohauer and the Order of this Court directing plaintiff Rohauer to show cause "why this action should not be dismissed with prejudice, and to show cause why this court should not cite him for contempt for disregarding the orders previously filed". Defendant appeared by its attorneys Ira J. Melaas, Jr. and James Gordon. Neither Mr. Rohauer nor his attorney Dudley C. Lowry appeared. Mr. Donald Doyle appeared for Mr. Lowry in response to a call from Mr. Lowry's secretaty the previous day. He was unfamiliar with the file and the circumstances and had not had the opportunity to discuss the case with Mr. Lowry. Because of the extreme sanction this Court intends to

impose upon Mr. Rohauer, the Court's experience with this plaintiff should be fully presented in explnatinn of such action.

This complaint alleging infringement of certain copyrights and praying for damages and injunctive relief was filed April 26, 1972. On July 6, 1972 defendant filed a motion to continue and stay proceedings pending the outcome of a similar case pending in the Southern District of New York. Plaintiff resisted this motion which was denied because it appeared the New York case would have no binding effect upon the parties to this case.

On April 24, 1973 in response to defendant's motion, the Court ordered Mr. Rohauer to submit to deposition in the Southern District of Iowa. On May 31, 1973 the Court ordered Mr. Rohauer to answer certain questions he had refused to answer at the time his deposition was taken.

As attempts to complete Mr. Rohauer's deposition during the summer of 1973 were unsuccessful, the Court entered the following order on October 12, 1973. "IT IS HEREBY ORDERED that the deposition of Raymond Rohauer be taken November 1, 1973 at 9:30 a.m. in the offices of the defendant Eastin-Phelan's counsel, unless counsel prior to that time have agreed upon a different date." On October 29, 1973 Rohauer filed a motion to extend time to continue the deposition.

because of the New York trial. He further stated at that time that the New York case "should be dispositive" of this case. This was contrary to the position taken by plaintiff in July of 1972.

The Court sustained this motion and changed the date for Mr. Rohauer's deposition to November 10, 1973. By agreement of counsel the deposition was reset for November 17, 1973. On November 13, 1973 Rohauer's counsel wrote defendant's counsel requesting an extension of the time for taking the deposition to November 21, 1973. As defense counsel was not available on that date the request was denied.

As Mr. Rohauer did not appear for the completion of his deposition on November 17, 1973, defendant on November 19, 1973 renewed its motion for sanctions under Rule 37. Resistance was filed November 29, 1973 claiming that Mr. Rohauer had made himself available for deposition November 21 or 23, 1973 and that defendant's counsel should have been able to complete the deposition at that time because "there appears to be only approximately 5 or 6 questions which the defendant's counsel wished Raymond Rohauer to enlarge on in his answer and that since they are minor questions it would have taken perhaps 15 to 20 minutes".

On December 3, 1973 the Court entered the following order:

> This matter is before the Court on a motion for sanctions under Rule 37 Federal Rules of Civil Procedure filed by the defendant Eastin-Phelan against plaintiff Raymond Rohauer.

Plaintiff Rohauer has been the subject of several court orders in recent months. All have stemmed from his apparent refusal to be deposed in this matter by defendant. On November 2, this Court entered an order directing the plaintiff to appear in defendant counsel's office for the purpose of a deposition on November 10. That date was postponed on mutual agreement of counsel until November 17, at which time plaintiff Rohauer did not appear.

In its motion for sanctions, defendant Eastin-Phelan seeks to have the Court dismiss the action. The Court is of the opinion that a dismissal at this point might be premature, and therefore would order the plaintiff and his counsel to show cause why this action should not be dismissed and why a contempt citation for violation of the Court's Order should not issue against plaintiff Raymond Rohauer.

THEREFORE IT IS ORDERED that the plaintiff Raymond Rohauer be given 10 days from the date of this Order to show cause why this action should not be dismissed with prejudice and to show cause why this Court should not cite him for contempt for disregarding the orders previously filed.

On December 17, 1973 the Court received the following letter from Dudley C. Lowry, Mr. Rohauer's attorney.

I am in receipt of Order filed in the above cause on December 3, 1973 relative to motion for sanctions under Rule 37 Federal Rules of Civil Procedure, filed by the defendant Eastin-Phelan against the plaintiff, Raymond Rohauer.

Please be advised that on November 29, 1973, I filed a resistance to motion for sanctions under Rule 37 at the Clerk's Office in Davenport. I am assuming that the Order was sent prior to receiving a copy of the resistance, however, I enclose a copy of the resistance.

On January 9, 1974 the Court wrote the following letter to Mr. Lowry.

> Please excuse my delay in answering your letter of December 17, 1973. In response to your questinn contained in the letter, I was aware of your resistance to the motion filed by the defendant and considered it prior to filing my Order to Show Cause.
>
> In that regard I would note that your letter to me was dated beyond the 10 day limit I set in the Order. However, I am going to consider your letter as response to the Order and set hearing on the Order to Show Cause for 4:30 p.m. January 30, 1974 in Davenport. An Order setting the hearing will be issued by the Clerk of Court

The Order setting "all pending matters" for hearing January 30, 1974 at 4:30 p.m. had been entered January 8, 1974. As previously indicated neither Mr. Rohauer nor Mr. Lowry appeared in response to that order or gave any indication to the Court that they could not or would not be present for such hearing.

It was the Court's intention when Mr. Rohauer appeared in Court to give him the opportunity to purge himself of contempt by completing the deposition. By Mr. Rohauer's counsel's own statements it should not have taken a great deal of time. Ordinarily a matter of this nature can be handled by the parties without any interference from the Court. The Court had no desire to impose more than minimum sanctions under Rule 37 if a deposition could have been completed at that time and the case moved along in an orderly fashion.

However, the failure of Rohauer and his attorney to appear before the hearing casts an entirely different light upon the matter. A hearing on an Order to Show Cause why the action should not be dismissed with prejudice and why Rohauer should not be punished for contempt can hardly be considered trivial. Rohauer's failure to appear or even indicate to the Court that it would be impossible for him to appear at that time graphically illustrates the utter disdain plaintiff has displayed toward Orders of this Court.

In the Court's opinion all the circumstances surrounding this case including such flagrant disregard of crucial orders of this Court in addition to constituting contempt of the court justify and demand the imposition of the most severe sanctions permitted under Rule 37.

Although it is the conduct of plaintiff Rohauer that deserves sanction, the complaint reveals the other plaintiff, Cecil W. Hull, is only a nominal plaintiff. As it is alleged that she assigned all of her rights in the copyright to Rohauer a dismissal of the action will in no way prejudice her.

IT IS THEREFORE ORDERED that the complaint filed in this matter is dismissed with prejudice at plaintiff Rohauer's costs.

IT IS FURTHER ORDERED that the counsel for defendant shall prepare and file a statement of reasonable expenses, including attorney fees, caused by the failure of Rohauer to make discovery as ordered by the Court. After an examination of such statement, the Court will enter an Order requiring Rohauer to pay such sum as appears to be reasonable and proper as part of the costs of this case.

Signed this 7 day of February, 1974.

/s/ W. C. Stuart
W. C. Stuart, U.S. District Judge
Southern District of Iowa

jw:mg

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

RAYMOND ROHAUER and CECIL W. HULL, :

Plaintiffs, :

v. : 71 Civil 4183

KILLIAM SHOWS, INC., PAUL KILLIAM, :
EDUCATIONAL BROADCASTING CORP.,
and the BOWERY SAVINGS BANK, :

Defendants. :

- x

B e f o r e:

HON. ARNOLD BAUMAN,
District Judge

New York, New York
November 5, 1973 - 2:15 p.m.

APPEARANCES

SCHWARTZ, MERMELSTEIN, BURNS, LESSER & JACOBY, Esqs.,
Attorneys for Plaintiffs
HERBERT P. JACOBY, Esq.,
of Counsel

ABRAHAM.M. FUSS, Esq.,
Attorney for Defendants Killiam Shows, Inc.,
Paul Killiam and Educational
Broadcasting Corp.

NICHOLAS A. D'ONOFRIO, Esq.,
Attorney for defendant Bowery Savings Bank
ALEXANDER M. SELKIRK, Esq.,
of Counsel

THE CLERK: Raymond Rohauer against Killiam Shows and others.

Is the plaintiff ready to proceed?

MR. JACOBY: Plaintiff ready.

MR. FUSS: Defendants ready.

MR. SELKIRK: Ready, your Honor.

THE COURT: We will take five minutes.

(Recess.)

MR. JACOBY: Judge Bauman, may I present my associate Mr. Robert Suggs. Mr. Suggs is a graduate of Harvard Law School last June where he did some work in copyright law. He is now associated with my firm and has helped me prepare this case for trial. And I ask your Honor's permission for him to sit at the counsel table.

THE COURT: Welcome, Mr. Suggs. I hope you will soon be a member of the bar of the court.

MR. FUSS: I would like your permission to have the defendant Mr. Killiam, who is a member of the Massachusetts bar, not of this bar, also sit with me at the counsel table.

THE COURT: Yes, indeed.

MR. JACOBY: In view of the fact, your Honor, that the parties to this case have entered into a stipulation of fact, I would assume that no opening statement is

required.

THE COURT: No, I have read it. It is most interesting.

MR. JACOBY: Yes.

Incidentally, in connection with that statement of facts, which is designed to shorten this trial, I do think that Mr. Fuss and Mr. Selkirk are to be commended for their association in making it possible.

THE COURT: I commend all of them. You just saved the Court a certain amount of time.

MR. JACOBY: In view of the fact that substantially all of the facts in this case have been agreed upon --

THE COURT: Excuse me. What reamins to be litigated? I understand the various questions of law to be presented, but what factually must I determine?

MR. JACOBY: I think Mr. Fuss can answer that better than I. As far as I am concerned, everything has been agreed upon.

MR. FUSS: From our point of view, your Honor, we have subpoenaed two witnesses and we would like to call the plaintiff Rohauer and question him. The two other witnesses are not available today, your Honor. One is from the firm of Dodd Mead & Company, the successor to the

publisher of the book, and the questions that we have for him are very brief. They relate to authorization, if any, with respect to the renewal of a copyright.

THE COURT" D n't worry about the amount of time. Just tell me what is in issue here.

MR. FUSS: The issue with respect to that witness is whether or not there was an authorization to renew the copyright in the literary work here, and that is one of the questions.

The other relates to the uses, if any, by the plaintiff, Rohauer, up to date with respect to the motion picture rather than the literary right.

And these are the only additional matters.

THE COURT: Does that go to your clean hands defense?

MR. FUSS: Yes. With respect to that we want to call the plaintiff Rohauer.

THE COURT: All right.

I didn't even think there were many facts in relation to that very seriously disputed matter as I read the stipulation and plaintiff's memorandum.

However, go ahead.

MR. JACOBY: Your Honor, all that I --

THE COURT: Who would you like to call?

MR. JACOBY: I am not going to call anybody. I am just going to read a few extracts from the deposition I have taken in this case, your Honor.

THE COURT: All right.

MR. JACOBY: Firstly I would like to read from the deposition of the defendant Paul Killiam taken on February 29, 1972, commencing at page 9, line 24:

"Q Mr. Killiam, are you familiar with a showing of the motion picture The Son of the Sheik which took place on July 13, 1971 over the facilities of Channel 13 in New York City?

"A Yes.

"Q Was that showing licensed by your company, Killiam Shows, Inc.?

"A Yes.

"Q Was that pursuant to a written license agreement?

"A Yes.

"Q Do you have the license agreement with you?

"A Yes.

"Q May I see it, sir?

"A Yes."

Thereupon the license agreement was marked for identification.

THE COURT: For the July showing?

MR. JACOBY: Yes. And I would like at this time to offer that contract dated May 7, 1971 between Educational Broadcasting Corporation and Killiam Shows, Inc. as Plaintiff's Exhibit -- we have through J on the stipulation.

THE COURT: Any objection?

MR. FUSS: No objection, your Honor.

THE COURT: Received.

xx (Plaintiff's Exhibit 1 received in evidence.)

MR. JACOBY: And I call your attention, your Honor, only at this time to that portion of this exhibit which is called Schedule A appearing at page 10, and to the page that is two pages thereafter, but is unnumbered, in which the pictures being licensed are listed and to the fact that the second picture on the list is the picture The Son of the Sheik.

THE COURT: I am a great believer in lawyers trying their own case any way they want, but the fact of the matter is that nobody disputes the thing was shown pursuant to Mr. Killiam's license in July and then twice more in the fall.

MR. JACOBY: Yes.

THE COURT: I mean, I don't regard that as a heavily controverted fact. Is it?

MR. JACOBY: No, it isn't, sir.

THE COURT: All right.

MR. JACOBY: Next, your Honor, I would like to read a few excerpts from the deposition of Hudson G. Stoddard, taken on April 12, 1972, commencing at page 3, line 23:

"Q Mr. Stoddard, by whom are you employed?

"A By the Educational Broadcasting Corporation.

"Q In what capacity, sir?

"A I wear two hats; one, I am vice president and secretary of the corporation; the other hat covers my services as vice president for development of WNET Channel 13.

"Q Is WNET Channel 13 owned and operated by Educational Broadcasting Corporation?

"A Yes."

Next, at page 6, commencing on line 7:

"Q Mr. Stoddard, did the Bowery Savings Bank have any relationship to this program?

"A On the record now?

"Q Yes.

"A They underwrote the production costs of our presentation of the series in New York.

"Q Was that pursuant to any contractual arrangement

between your company and Bowery Savings Bank?

"A It was pursuant to an agreement reached with them, yes.

"Q Is that agreement in writing?

"A There was correspondence between ourselves and Bowery consisting of an initial proposal by us and a letter of response by them.

"Q That constitutes the arrangement between the two of you?

"A That's correct."

And at that point, sir, we marked for identifcation a letter dated April 26, 1971, written by one Elihu E. Harris, Associate Director, on the stationery of Educational Broadcasting Corporation, addressed to Mr. John W. Larson, president of the Bowery Savings Bank, and an answer thereto dated May 4, 1971, on the stationery of the Bowery Savings Bank, written by one John M. Shea, addressed to Mr. Elihu E. Harris, at Educational Broadcasting Corporation.

I would like very much to offer these two letters as Exhibits 2 and 3.

MR. FUSS: No objection.

MR. SELKIRK: No objection.

THE COURT: Received.

(Plaintiff's Exhibits 2 and 3 received in evidence.)

MR. JACOBY: Finally, your Honor, I would like to read some excerpts from the deposition of Mr. Shea, who is the gentleman who wrote Plaintiff's Exhibit 3.

Commencing at page 4, line 8:

Incidentally, Mr. Shea has identified himself as the assistant vice president of the defendant Bowery Savings Bank.

At line 8:

"Q To your knowledge, did the Bowery Savings Bank have any relationship with the presentation commencing in July of 1971 of a program entitled The Silent Years that was shown over the facilities of Channel 13 in New York City?

"A Yes, the Bowery had agreed to contribute in underwriting to make the broadcast possible."

Then at page 10, line 23:

"Q In your letter of May 4th, which is Exhibit 5" -- and parenthetically is now Exhibit 3 on this trial -- "you conclude by stating, 'We look forward to meeting with your staff at the earliest opportunity to work out details of the program.'

"Were you present at any such meeting?

"A Yes, we defined the details of the program being our coordination of our effort with that of the Channel, not insofar as working on the selection of films. And there were subsequent meetings at which I and other members of the Bowery met with members of Educational Television to discuss our efforts and along with their efforts in getting the thing on the air.

"Q Apart from furnishing the $75,000, what were your efforts to be?

"A Our efforts would include helping to assist in getting publicity in the financial and business press, in providing advertising support to attract viewers, in providing material about the series for distribution to depositors.

"Q And was a budget set aside for this purpose by the bank?

"A No, no budget was set aside."

And continuing on page 14, line 25:

"Q If you recall, can you tell me the form in which the Bowery's underwrting of this program was conveyed to the public on the television screen as the pictures were exhibited?"

"Mr. Selkirk: If you know.

"Q If you recall.

jw:mg 11

"A We were promised an opening and closing billboard, as they described it, which would merely give the name of the bank, on Bowery Savings Bank, and there were some discussions of whether we should say we were in New York or not. I really don't recall whether we did or not.

"But there was nothing else that we could say and this was the only visual thing that we prepared and submitted to the channel. All that would be done is that the commentator would say the series was brought to you through a grant through the Bowery Savings Bank.

"Q But you received an opening and closing credit on the screen in which the name of the bank appeared?

"A Yes, and a mention of the name of the bank, although there was no way in which to use that as a commercial message, since it is not a commercial channel. So there is no way of us saying anything more about ourselves than our name."

Next I would like to read from page 12 at line 12:

"Q Are you the person who made the decisions for the bank as to what was going to be expended in the way of promotional material for this program?

"A A promotional program was submitted by us with a budget attached, which was then approved at other

management levels of the bank.

"Q And did you participate in the preparation of that submission?

"A Yes.

"Q Did that program envision and contemplate the placing of paid advertisements in newspapers?

"A Yes, it did.

"Q And the preparation and placing of paid advertisements in the New York City Transit System and particularly in the buses?

"A That's correct.

"Q And did it contemplate the preparation and dissemination of posters to persons who desired to obtain the same at the bank premises, such posters containing scenes or stills from the pictures?

"A That would be probably the biggest part of the entire program as contained in those three areas that you mentioned."

And finally from page 16, line 12:

"Q Was all the money that was expended in advertising and promoting this program spent by Bowery Savings Bank or was any part of it contributed by Educational Broadcasting Company?

"A All the ads in which the Bowery's name was

mentioned were paid for entirely by the Bowery. There had been some discussion that the channel would run an ad at the beginning of the series which itself would pay for and mention our underwriting. This never ran, to my knowledge, this ad.

"Q So that the net result was that all of the advertising and publicity was paid for by the bank?

"A That's right. I would like to take that back. You used two different terms. You used 'advertising' and 'publicity.' Advertising I would say yes, we did; and publicity for the serial was handled and paid for by them as well as press parties and other events."

MR. JACOBY: Finally, your Honor, I merely want to direct your attention to Exhibit H attached to the stipulation of facts, being a letter from me to the Educational Broadcasting Corporation, dated October 6, 1971, dealing with the projected showing of October 11 and October 16.

I want to call your attention to the fact that a copy of that letter was forwarded to the firm of Cadwalader, Wickersham & Taft.

I just want to be sure, your Honor, that the file shows that as of that date the firm of Cadwalader, Wickersham & Taft had appeared in this action on behalf of the Bowery

Savings Bank and were substituted out in favor of the present attorney Coppola & D'Onofrio on October 21, 1971.

I don't know whether this stipulation is in the file.

THE COURT: You may hand it up now.

Mark it as an exhibit.

(Plaintiff's Exhibit 4 marked for identification.)

MR. JACOBY: May I offer it?

THE COURT: I take it you have no objection to that being received in evidence.

(Plaintiff's Exhibit 4 received in evidence.)

MR. JACOBY: Plaintiff rests, your Honor.

MR. FUSS: If your Honor please, I assume that the exhibits annexed to the stipulation are in evidence. If not, I would have the stipulation and the exhibits put into evidence.

THE COURT: I think it ought to be marked in evidence as a matter of fact, yes.

(Defendant Killiam Exhibit A received in evidence.)

MR. FUSS: Would you mark this as Defendant's Exhibit B, please.

(Defendant Killiam's Exhibit B marked for identification.)

jw:mg 15

MR. FUSS: In accordance with the stipulation, Paragraph 29, we are offering into evidence Defendant Exhibit B which is an assignment from Greystan Enterprises to Killiam Shows, Inc., which I have shown to Mr. Jacoby and he has indicated he has no objection.

MR. JACOBY; I have no objection.

THE COURT: We are going to talk about at the end of this presentation some time, gentlemen, what you are going to furnish to my chambers in the way of these exhibits and findings and conclusions and that kind of thing.

Is anybody ordering the record of this proceeding?

MR. JACOBY: Not yet, but if your Honor feels he needs it, I would be happy to do so.

THE COURT: I am beginning to think it would be useful since so much is incorporated by reading in and that kind of thing.

Would you do that, sir?

MR. JACOBY: Yes.

THE COURT: Thank you.

xx (Defendant Killiam's Exhibit B received in evidence,)

MR. FUSS: I now call the plaintiff, Raymond Rohauer.

jw:mg Rohauer-direct 16

RAYMOND ROHAUER, called as a witness by Defendant Killiam Shows, Inc., having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FUSS:

Q Mr. Rohauer, what is your business?

A Film distribution.

Q How long have you been in that business?

A About fifteen years.

Q Do you maintan an office?

A Not at the present time.

Q When did you last maintain an office?

A No, I said I don't have an office at the present time.

Q I asked you when you last maintained an office.

A I didn't have an office.

Q Approximately how many films do you have an interest in?

A Several hundred.

Q Do you have a copyright interest in several hundred films?

A Yes.

Q Do you keep records with respect to those films?

A Yes.

Q Where do you keep those records?

A In my files, or in the files of the various attorneys I use.

Q Where do you keep your files?

A At 308 West 58th Street, New York.

Q Is that your residence?

A Yes.

Q Do you keep account books with respect to what these films that you have an interest in do?

A My accountant does.

Q You don't keep any books with respect to the activities of these films?

A No, my accountant does.

Q And do you have an interest in the motion picture The Son of the Sheik?

A I have an interest in the literary work.

Q Is that interest derived through an assignment which is Exhibit D attached to the stipulation?

A Yes.

Q Do you have any other basis for having an interest in the literary right of The Son of the Sheik?

A No.

Q Or in the motion picture Son of the Sheik?

A No.

jw:mg Rohauer-direct 18

Q Can you tell us the circumstances under which you obtained this assignment?

MR. JACOBY: I object, your Honor. I think the assignment speaks for itself and it is a matter of record.

THE COURT: Why do you want this?

MR. FUSS: Your Honor, it is relevant in terms as to who prepared it and whether any ambiguity in the assignment can be construed.

THE COURT: I am going to limit you. You gentlemen are going to have to educate me in this field.

Let me tell you my simplistic view of this case. The question really, as I understand it, comes down to this: Somebody wrote a book called The Son of the Sheik. She authorized -- I believe it is somebody named Moskowitz -- to have the movie rights of Son of the Sheik. There came a time when she died.

The literary work, the renewal of the literary work was the property of her son or daughter.

MR. JACOBY: Daughter.

THE COURT: Cecil somebody. Meanwhile Mr. Moskowitz went merely along with his moving picture and he, too -- I may be mistaken on this -- granted an extension of his original moving picture.

The question really comes down to, as I understand it-- and I do invite your comments, gentlemen -- Mrs. What's her name's death, in substance, at the conclusion of the first license for moving pictures terminate that license really.

MR. FUSS: That is one of the questions, your Honor.

THE COURT: What is the other?

MR. FUSS: There are several other questions and one of the other questions relates to whether or not in the assignment to Mr. Rohauer by the daughter -- and it is conceded in the stipulation that the daughter is named here as a plaintiff merely as a nominal plaintiff, she has no real interest--

THE COURT: Yes.

MR. FUSS: -- whether that assignment is in any way a rededication or a recognition of the previous assignment.

In other words, one of the subsidiary questions is whether or not Cecil Hull thought that she was assigning the movie rights, cutting off the previous rights granted.

We respectfully suggest that if you examine that assignment there is some ambiguous language in that assignment as to what she was giving Mr. Rohauer.

So one of the questions to be decided is what she was intending to give Mr. Rohauer and how did she get whatever knowledge she had with respect to the transaction.

MR. JACOBY: Your Honor, in this connection -- and I hate to complicate matters --

THE COURT: No, no, I enjoy it.

MR. JACOBY: This case involves a United States copyright application. However, this grant to Mr. Rohauer from Miss Hull was a worldwide grant.

And the law in other countries, as your Honor saw in the supplemental memorandum I submitted this morning, are somewhat different than the law of the United States.

For example, in 1965, when this document was executed, Miss Hull, the grantor, did not yet have rights, for example, in Great Britain. They would not come back to her until 25 years after her mother's death, which would not be until 1968. And that accounts for some of the language in this document drawn by two very able British solicitors.

THE COURT: Overruled. You may proceed.

MR. FUSS: Would you read the question?

(Question read.)

A I contacted my attorney in London to investigate

the holder of the rights of a novel, The Sons of the Sheik, and he did the research on this and also located the attorney handling Cecil Hull.

They negotiated for a period of some months and a document was drawn and signed and the consideration paid.

Q Did you have any attorneys in the United States that examined that document prior to your paying the money?

A No. The only attorney I consulted with in the United States was Mr. Brylawski in Washington,D. C., who did some research for me.

Q Did you not show this assignment to an attorney in New York, Mr. O'Brien?

A I showed him the assignment after it was received and he made photocopies of it.

Q I would like to read from the deposition taken of you at page 178 starting with line 13. This is referring to the assignment.

"Q Did Mr. O'Brien see it before you sent it in?

"A I think Mr. O'Brien expressed an opinion to Mr. Owen. In fact, I remember that.

"Q When was that?

"A The time while this was coming up. He assured me that--

"Q Before it was signed?

"A That this was the law of the United States.

"Q That was before it was signed?

"A Yes.

"Q Is that yes?

"A Yes. I am sure of that."

Was that answer that you gave at the deposition incorrect, Mr. Rohauer?

A I corrected that at the time, after I spoke to Mr. Jacoby and I said I couldn't remember when it was shown to Mr. O'Brien. I thought it happened some years ealier, five or six years earlier. And after I thought about it, it was afterwards, and not before.

Q Did you ever meet Cecil Hull?

A No.

Q Did your attorney ever meet Cecil Hull?

A Not to my knowledge.

Q What was the purpose of your obtaining this assignment?

A It was planned to do a remake of the film.

Q And did you in fact make a remake of the film?

A Not as yet. We have the right to do so.

Q This assignment was obtained on May 6, 1965?

A Yes.

Q What steps have you taken since then with respect

to exploiting this assignment?

MR. JACOBY: Your Honor, I think this is a wholly irrelevant line of inquiry.

THE COURT: Sustained.

MR. FUSS: Your Honor, I submit that the only purpose that plaintiff had in obtaining this assignment was to bring this kind of lawsuit here, that he never exploited it in any way and never intended to.

THE COURT: Supposing he did, so what? The question is did he have a viable interest in an extant copyright. What has motives got to do with it?

MR. FUSS: They also have to do as to what he told the assignor at the time-- or what was told to the assignor at the time that this agreement was reached, if, in fact, he told her that he was going to make a remake. And that sheds light in terms of --

THE COURT: Supposing he told her I am going to make a remake and supposing he didn't even make one? There are a whole myriad of possibilities, right? He could have had in mind to make a remake. He could have said that to her simply to make her more amenable to selling, a whole variety of reasons.

What has that got to do with the issues confronting us here, namely -- and I do have this way of oversimplifying

it -

MR. FUSS: No, your Honor, I appreciate what your Honor is saying.

THE COURT: Le me finish; maybe you will appreciate it a little more. I am laboring under the impression that I am here to decide whether any copyright was infringed by the showing of this film three times in one summer over Channel 13.

How close to being right am I about that?

Is that right or wrong?

MR. FUSS: That is only part of the question..

The question is whether this particular plaintiff had the ownership of that copyright so that he could come into this court and make the claim.

THE COURT: That is part of the question, of course. That basically is the question I am here to decide, isn't it? I invite your disagreement if you disagree with me.

MR. FUSS: I submit to your Honor that is one of the questions that has to be decided.

THE COURT: You keep saying that, but I don't hear any other.

As of now, I suggest that that is the only question I see myself as here to decide. There may be some

incidental fall-out, but that is the basic question I am here to decide:

Who has a viable copyright and was there any infringement.

MR. FUSS: Obviously, your Honor, in respect to the affirmative defenses either we reached that point --

THE COURT: There is a factual determination to be made on some of those.

MR. FUSS: Even if you would reach such a conclusion, assuming that you would, that doesn't necessarily mean that these plaintiffs can recover.

THE COURT: Yes, but I must say I am impressed so far in the plaintiff's memorandum about the effect of the clean hands doctrine in copyright cases.

Of course, I do invite a memorandum from you.

MR. FUSS: I have one here, your Honor, and I will submit it.

THE COURT: I don't want to limit you in your examination. On the other hand, I don't want you to go all over the lot either.

MR. FUSS: We do have a question of damages here, too.

THE COURT: By all means. I was wondering when somebody was going to mention that.

MR. FUSS: I am entitled to ask what—

THE COURT: Ask your questions and I shall not limit you, unless it gets beyond what I can see is relevant. For the moment, at least, I regard the clean hands doctrine as having something to do with the basic cause of action. That is where my mind is made up at the moment.

If you have got cases other than that which may have arisen in equity actions on the Queen's bench in the 18th Century, I would be interested in hearing it.

MR. FUSS: Before I forget, your Honor, let me submit my memorandum.

THE COURT: Thank you.

Q Mr. Rohauer, how much money have you made with respect to Son of the Sheik since you obtained the assignment?

MR. JACOBY: I object.

THE COURT: Overruled.

A There are certain licensing fees when people approached my attorneys about getting permission to show the film in England, but I don't have those amounts. I don't have it tabulated because it is all in English pounds and so forth.

THE COURT: That is readily convertible, it seems to me, if I know the number of pounds and taking the

appropriate rate of exchange we can figure out how many dollars that is.

A But I would estimate there might have been a thousand pounds, something like that.

Q Have you made any money with those rights in the United States?

A No.

Q In the late 1950's and early 1960's did you not operate a movie theatre?

A Yes.

Q In addition to what we have stipulated in the stipulation, Paragraph 30, that you purchased prints from Jensen of Son of the Sheik, did you not purchase prints of this film from other sources?

A Such as the prints on back-logged films.

Q Did you not purchase the film from Ideal?

A I don't recall where I purchased it from, because through the years I either rented it or dealt with Jensen. I can't remember which one was which, no.

Q Did you not purchase from Charlie Mogull prints of film?

A I may have rented it from him, I don't think I purchased it, no.

Q When you rented the film, what did you do with it?

A I rented it at my theatre. It was exactly a theatre, it was a film society. It wasn't a regularly-established theatre.

Q Was the public invited?

A Ghere was a mailing list operation, no paid advertisement in the newspaper.

Q People paid money to come to attend?

A Yes.

Q And you operated it?

A It was memberships for sale, yes.

Q Db you have any prints of Son of the Sheik?

A Yes.

Q What prints or negatives of the motion picture Son of the Sheik do you have?

A I have one eight millimeter print.

Q Is that all you have?

A That's all I have.

Q You don't have a 35 millimeter print?

A No, I don't.

Q On page 17 of your deposition, line 9:

"Q Hvae you obtained any prints of the film?

"A Yes. I bought a print from Emil Jensen some years ago.

"Q Was that prior to 1965?

"A Yes.

"Q Do you still own that film print?

"A Yes, there are prints being sold by him all the time."

"Mr. Jacoby: Was that 16 or 35 millimeter?

"The Witness: He sold 16 or 35.

"Mr. Jacoby: What did you have?

"The Witness: 16.

"Q Was that the only print of Son of the Sheik you have?

"A Yes -- well, I have a silent version and a sound version.

"Q Did you buy each of those?

"A Yes.

"Q The one that you bought from Jensen, which one was that?

"A I bought both of those from Jensen."

Is that testimony, Mr. Rohauer, to be corrected now?

A As I thought about it, because you asked me these questions several times, the only print I have is the 8 millimeter print I just told you about.

The Jensen transaction was in the early 1950's. I can't remember what happened to the print.

MR. FUSS: May I have this marked for identification.

THE COURT: It is my practice to take a ten-minute recess at this time, gentlemen, and we will sit until 4:30.

xx (Defendant Killiam Exhibit C marked for identification.)

(Recess.)

MR. SELKIRK: Your Honor, I would like to give the Court the trial memorandum of the Bowery Savings Bank.

Q Mr. Rohauer, I show you Defendant Killiam Exhibit C for identification and ask you to look at the inside pages there.

MR. JACOBY: May I see the document, your Honor?

MR. FUSS: My apologies.

MR. JACOBY: I have no objection.

THE COURT: Received.

xx (Defendant Killiam Exhibit C received in evidence.)

THE COURT: The witness has read it.

Q Mr. Rohauer, do you want to change your testimony with respect to how many prints or negatives of the film Son of the Sheik you have?

A No, I do not.

Q I read to you from Defendant Killiam Exhibit C in

evidence.

We have here "Delivery notification order" on January 8, 1971, which indicates that a one 35-millimeter negative and a one 35-millimeter print was delivered to Mr. Raymond Rohauer collected by Joynson-Hicks Company.

Do you know who Joynson-Hicks Company is?

A Yes.

Q Who are they?

A Attorneys in London.

Q Do they represent you?

A They did at that time.

Q 1970?

A Yes.

Q Can you tell us what happened to this film and negative?

A Yes, John Huntley and the British Film Institute [illegible] the material of Son of the Sheik there from the English [illegible] tributors who claimed all rights --

Q Mr. Rohauer, could you please respond to my question?

This was delivered to Joynson-Hicks, your attorneys.

Can you tell us what happened to this print, the negative, after it was delivered to them in 1970?

A I was trying to explain it to you.

Q Go ahead.

A And they came to me for my consent because of the literary rights, and whether this could be made for the English distributor who deposited this material at the British Film Institute, and this material was delivered to the English distributor.

MR. FUSS: Your Honor, I fail to understand what Mr. Rohauer has said is responsive to my quetion.

THE COURT: Well, try again.

Q This film and negative was delivered to Joynson-Hicks. Was that on your account?

A I don't know whether it was delivered to them or not. I have no record of that.

That is what you are saying, that is not what I am saying.

Q You say you don't know whether it was ever delivered to your attorneys?

A That's right.

Q So you don't know where that material is now?

A That's right.

Q In the late 1950's, in addition to operating a movie theatre, did you operate a film society?

A It is the same thing. It was the film society I ran. It was not a movie theatre. I explained that

already.

Q What name did that have?

A The Society of Cinema Arts which operated at the Coronet Theatre. That is where the premises were located.

MR. FUSS: Would you mark this, please.

xx (Defendant Killiam Exhibit D marked for identification.)

Q Is this the catalog, Exhibit D? Is that the catalog of your society?

A This was never published. I told you this before. This was never published.

Q Was that prepared by your film society?

A Yes, but it was never issued.

MR. FUSS: May I offer this in evidence, your Honor.

THE COURT: Any objection?

MR. JACOBY: No objection.

THE COURT: Received.

xx (Defendant Killiam Exhibit D received in evidence.)

Q This society which you operated, did it offer films to universities, clubs, homes and colleges?

A It was going to, but it didn't.

Q You mean this society never became operational?

A It was just for the exhibition of films and it was going to go into the rental library business, but it didn't.

Q You say it was for the rental of film.

That was to rent to others, is that correct?

A Yes, that was the purpose.

Q Does that mean that you own prints that you could rent to others?

A No, sometimes you get prints from owners who would make them available and share the rental.

Q With respect to The Son of the Sheik, did you own the print then?

A Well, as I remember, that pamphlet in your hand is about almost 20 years old, or 15 years, anyway.

Q You don't remember whether you owned the print then?

A No, I might have gotten it from a library who wanted it published in there.

Q Do you do business with an organization known as Fleetwood or Audio Brandon Films?

A Yes, I do.

Q What is that organization?

A Film rental business.

Q How long have you been doing business with them?

A About maybe 18 years.

Q Continuously to date?

A Well, off and on. Yes, I would say pretty much.

Q Do they distribute or use film that you have an interest in even today?

A Yes, they do.

Q Did they, to your knowledge, distribute Son of the Sheik?

A Yes, they had a print from a man by the name of Jack Lewis.

Q And did they advertise that in their catalog?

A It was in their catalog, yes.

Q Has it been in their catalog, as far as you know -- how long has that been in their catalog?

A I really don't know. I don't run their business. I wouldn't know.

Q But they have your film?

A Yes, they have some of my film.

Q And do you periodically look at their catalog?

A Yes, whenever they issue a new one.

Q Do you check up to see which of your films of the many films that you have that they are distributing?

A Yes, I check it out, yes.

Q When was the last time you did that?

A I don't know. Maybe a year ago.

Q Did they have listed Son of the Sheik?

A I don't recall that. I don't know whether it is in there or not.

Q You didn't look to see what's in there?

A I looked at my own films.

Q In other words, it would make no difference to you if they had Son of the Sheik in that film, in that catalog, or they didn't?

A No.

MR. JACOBY: I object.

THE COURT: Overruled.

A As far as I know, they don't have the picture.

Q It is not in their catalog?

A I didn't say that. I discussed it with Myron Bresnick and he said he doesn't have the picture.

THE COURT: The answer is to his knowledge they don't have the picture.

A That's right. He said they list several pictures, but they don't have films or prints.

Q Did you say they obtained the film from a man by the name of Mr. Lewis?

A I did know they had a print from Mr. Lewis because

when I was running my film society I rented the print from time to time.

Q I read to you from page 18 of the deposition, Mr. Rohauer:

"Q Do you know whether Fleetwood Film in the United States has distributed Son of the Sheik?

"A Yes.

"Mr. Jacoby: Do you know?

"The witness: Yes.

"Q Do you know when they distributed it?

"A Well, I suppose through the years. It is in their catalog.

"Q Was that distribution with your authorization?

"A One of my prints from Emil Jensen I gave them and they told me that they had the print from somebody else.

"Q What was the last statement?

"A They had another print from somebody else.

"Q Did you authorize them to distribute it, make copies?

"A No. To distribute it, to rent it out, not distribute it. Then I withdrew the picture.

"Q When did you authorize them to rent it out?

"A Oh, some years ago, about maybe-- it might

have been around 1962, 1963.

"Q 1962 or 1963?

"A Yes.

"Q Prior to your receiving the assignment?

"A Right.

"Q And when did you withdraw the film?

"A Maybe 1968 or 1969, or maybe 1967. I don't remember exactly."

Now, at the time that you testified in your deposition and made these statements --

THE COURT: First of all, were you asked those questions and did you make those answers?

THE WITNESS: Yes.

THE COURT: All right.

Q This took place on January 13, 1972.

Did you believe that you had authorized Fleetwood to show that film?

A I don't understand your question.

Q When you made these statements-- when you gave these answers to these questions in January, 1972, did you believe that you had authorized Fleetwood to distribute this film?

A I checked with Fleetwood --

Q I am asking you. My question, at the time you

gave these answers, did you believe you did that?

A I couldn't remember exactly and so I checked it out and I found out that it was not, it had nothing to do with me. Fleetwood was not distributing the picture.

Q At the time that you gave these answers to these questions, did you believe that you had the authority to authorize somebody to show these films?

A On the literary rights basis, yes.

Q 1962 and 1963?

A No, I am talking about after 1965.

Q On page 54 of your deposition, starting with line 8:

"Q Do you recall offhand whether or not between 1965 and 1970 you received any moneys with respect to your alleged rights to Son of the Sheik?

"A Not offhand.

"Q Well, you have testified that you received certain lump sums from --

"A From Fleetwood Films.

"Q Fleetwood Films. Is that right?

"A Yes.

"Q And part of that lump sum was as a result of the showing of Son of the Sheik, is that right?

"A I said probably. It is a lump sum. I don't know

what the bookings were."

Did you give these answers in response to these questions?

A Yes, I gave those answers.

Q At that examination?

A Yes.

MR. FUSS: I have no further questions.

MR. JACOBY: I have no cross, your Honor.

MR. SELKIRK: No questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call your next witness, please.

MR. FUSS: If your Honor please, we have no further testimony today.

We have subpoenaed two other witnesses, one who will not be back in the country until Wednesday, and I advised Mr. Jacoby. I would like to be able to call the two witnesses. It won't take very long. I would like to call them on Wednesday.

I would also like the opportunity to submit a supplemental memorandum.

THE COURT: Yes. We will deal with that after all the testimony is taken.

How many witnesses do you have, Mr. Selkirk?

MR. SELKIRK: None, your Honor.

THE COURT: Do you have any more?

MR. JACOBY: No, your Honor.

THE COURT: It sounds like we will be through with the testimony in this case by the luncheon recess on Wednesday.

MR. JACOBY: Before that. The other witnesses shouldn't take half an hour.

MR. FUSS: That's right.

MR. JACOBY: If Mr. Fuss has any problem, I will try to stipulate with him as to what they will testify to.

THE COURT: We will recess now, gentlemen. Tomorrow is a Court holiday. I will see you at ten o'clock promptly on Wednesday.

MR. JACOBY: Your Honor, I want to make this observation: I am perfectly aware of the fact that on my side of the case I have introduced no evidence as to damages, it being my understanding that before I am entitled to do so I must prevail on the merits.

THE COURT: I realize that it is customary in cases of this kind to bifurcate these trials. I think we will leave it in that posture.

MR. JACOBY: Thank you, your Honor.

(Adjourned to November 7, 1973, 10:00 a.m.)

Raymond Rohauer and Cecil W. Hull

J. Bauman v. 71 Civil 4183

Killiam Shows, Inc., et al.

November 7, 1973
10:00 a.m.

(Trial resumed.)

MR. FUSS: I would like to call the next witness, Mr. Dodd.

J O N A T H A N D O D D, called as a witness by Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FUSS:

Q Mr. Dodd, what is your occupation?

A I am a publisher.

Q What firm are you associated with?

A Dodd Mead & Company.

Q Have you appeared here today pursuant to a subpoena which I had caused to be served upon you?

A Yes.

Q Did you search your files of your company to find any documents relating to the literary work Sons of the Sheik or the motion picture Son of the Sheik?

A Yes, I did.

Q And did you find any documents?

A Yes, I did.

Q Do you have with you a copy from your office records of the renewal registration for the novel The Sons of the Sheik?

A I do.

MR. FUSS: Would you mark this, please.

xx (Defendant Killiam Exhibit E marked for identification.)

Q Mr. Dodd, where did you find this Defendant Exhibit E?

A In our copyright safe at the office.

Q How long has your company been in business?

A Since 1939.

MR. FUSS: I offer this in evidence, your Honor.

MR. JACOBY: No objection.

THE COURT: Received.

xx (Defendant Killiam Exhibit E received in evidence.)

MR. JACOBY: It is my understanding that that

was appended as Exhibit C to this stipulation of facts.

MR. FUSS: I believe so.

Q Mr. Dodd, did you find any other documents relating to The Sons of the Sheik?

A I found the original copyrights card covering this work. This is the original copyright registration for the work.

MR. FUSS: Would you mark this, please.

xx (Defendant Killiam Exhibit F marked for identification.)

Q Where did you find this card?

A In our copyright safe.

MR. FUSS: I offer it in evidence.

MR. JACOBY: No objection.

MR. SELKIRK: No objection, your Honor.

THE COURT: Received.

xx (Defendant Killiam Exhibit F received in evidence.)

Q Are there any other cocuments that you found relating to Son of the Sheik or Sons of the Sheik?

A I did find a contract that while it does not specify that the title mentioned in it is The Sons of The Sheik, it is my understanding that this is the original contract for that particular title.

Q Do you have any records that would relate this particular contract to The Sons of the Sheik?

A We do have a contract card which specifies that the contract for The Sons of the Sheik was dated February 2, 1922, which is the date of this particular document.

Q Do you have an agreement between Edith Hull and Small, Maynard & Co. with respect to the book The Sheik?

A Yes, we do.

Q What is your company's relationship to Small, Maynard & Co.?

A In, I believe, 1929, we bought Small, Maynard & Co.

MR. FUSS: Would you mark this, please.

THE WITNESS: I'm sorry, that date is July 1962.

xx (Defendant Killiam Exhibit G marked for identification.)

xx (Defendant Killiam Exhibit H marked for identification.)

Q Mr. Dodd, I show you Defendant's Exhibit H, which is the card, and ask you where you found this card?

A It was in a contract safe at the office.

MR. FUSS: I offer Exhibits G and H into evidence.

MR. JACOBY: No objection.

MR. SELKIRK: No objection.

xx (Defendant Killiam Exhibits G and H received in evidence.)

Q Mr. Dodd, did you find any other records with respect to Son of the Sheik?

A No, I did not.

Q With respect to the novel Sons of the Sheik?

A No.

Q Did you find a letter of authorization from Cecil Hull with respect to Sons of the Sheik?

A No, I did not.

MR. FUSS: I have no further questions.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. JACOBY:

Q Mr. Dodd, how long have you been associated with the firm of Dodd Mead & Company?

A 15 years.

Q That takes you back to 1958, roughly?

A Correct.

Q What positions have you held during that 15-year period commencing with the 1958 employment?

A Copyrights and permissions and director of subsidiary sales.

Q I call your attention, Mr. Dodd, to Exhibit E, which is the certificate of registration of the renewal claim in the novel Sons of the Sheik and particularly in the reference to the left-hand top corner saying Page 1A.

A Right.

Q Do you correctly assume from your experience you are familiar with the form that is filed with the Copyright Office and with the facts that it is a double sheet of which this is the second page?

A Yes, I am.

Q And the other half bears the notation "Page 1 and Page 2" whereas this half bears the notation "1A and 2A"?

A I believe that is correct.

And the front part, page 1 of the other half is identical with Page 1A?

A I believe it is or was.

Q But the rear half, Page 2, is completely different than Page 2A?

A Yes.

Q On Page 2 appears the signature of the person who is filing the application?

A Correct.

Q Do you know of your own knowledge who signed that?

A No, I don't.

Q I show you Exhibit F.

There appears to be stamped on this copyright card the words "Transferred July 16, 1926 to Dodd Mead & Co."

Do you see that?

A Yes.

Q Would you please explain to me and to the Court what that stamp is supposed to indicate?

A This stamp, I believe, is a stamp put on by the Copyright Office indicating that in addition to selling us their publication list, Small, Maynard also transferred the actual copyrights that were in their name to Dodd Mead & Company so that any copyright that was in the name of Small, Maynard & Co. would now read as being in the name of Dodd Mead & Company.

Q With reference to Defendant's Exhibit H, I see noted thereon the title of a book called The Lion Tamer.

Could you please tell me what that has reference to?

A The Lion Tamer was a book by E. M. Hull that we published in July of 1928.

Q Yes, I see that. What relationship does this card have to the novel Sons of the Sheik?

A. There was a contract with Small, Maynard for three books to be published following The Sheik by Edith Hull. It was a three-book contract and The Lion Tamer was one of those three books that that contract covered.

Q And Sons of the Sheik was another, to the best of your knowledge?

A To the best of my knowledge, Sons of the Sheik was the first book to be covered under that three-book contract and was followed by The Lion Tamer and one other title.

Q At the foot of this card there is a notation, "Sent to Washington," and then in pen the word "Yes."

What does that signify to you?

A That signifies that the work had been published in a magazine called Cosmopolitan and that they assigned their copyright in it to Dodd Mead at which point we sent that to Washington for registration.

To the best of my knowledge, that is what I believe it refers to.

Q You sent it to Washington for registration?

A Yes.

Q So that it was the custom and practice of your firm to handle all copyright matters for the office?

A Right.

Q Sir, I show you Exhibit G, which is the memorandum of agreement dated February 2, 1922.

A Yes.

Q To the best of your knowledge, the book The Sons of the Sheik was published by Small, Maynard pursuant to this document?

A Yes.

Q Was the book a successful book so far as you know?

A I don't know.

Q Is it still in print?

A No, it is not.

Q Have any copies of the book, to your knowledge, been sold since the time you have been associated with Dodd Mead?

A No.

Q You say to your knowledge no copies have been sold?

A That's right.

Q Would the records of your company indicate whether any copies were sold between 1952 and 1958 when you came with the company?

A There might be records that would indicate this, yes.

Q In the course of the investigation that Mr. Fuss asked you to make, did you look for that?

A I did, and I did not find any such record at the main office.

Q This agreement, Exhibit G, calls for the payment of certain royalties by the publisher to the author.

Do you know whether any royalties were ever paid by either Small, Maynard or by your company as its successor commencing in 1926 to Edith M. Hull in connection with this novel?

A I do not know.

Q Do the records of your company indicate whether or not any such royalties have been paid?

A There should be records, but I haven't been able to find it.

Q How far back do the records go?

A I don't know.

Q It has been stipulated in this case that Edith Maude Hull died in 1943.

Do you know whether any royalties were paid by Dodd Mead & Company with respect to this book after 1943?

A I do not know.

Q Is it the practice in the book publishing industry for a book publisher to participate in the payments

received from the sale of motion picture rights in a book which it publishes?

A If by contract they control the motion picture rights, they do get a share.

Q But is it the practice generally?

A That I don't know.

Q You say that you were active in the subsidiary rights division of your company?

A Yes.

Q Are motion picture rights considered a subsidiary right?

A They are.

Q And have any of the books that your company has ever published been sold for motion picture purposes?

A They have.

Q And did your company on occasion share in the royalties -- in the consideration received for the sale of the motion picture rights?

A Yes.

Q Are you aware of the fact that the motion picture rights in this particular book were sold pursuant to an agreement dated December 7, 1925 between Edith Maude Hull and a man named Joseph H. Moskowitz?

A I am not aware of that now.

THE COURT: Let me ask you one or two questions, Mr. Dodd.

BY THE COURT:

Q You discussed the situation in which presumably the author has assigned or whatever to the publisher all of his right, title and interest in and to that book covering all kinds of rights.

Is it not the fact, as well, that often the author will only transfer the rights to the book and retain for negotiation by himself, or his lawyer or agent, the motion picture rights?

A That is often the case, yes.

THE COURT: All right.

BY MR. JACOBY:

Q But even where the author retains the right to negotiate for the motion picture rights, is it not the practice on occasion for the publisher to share in the proceeds of the sale?

THE COURT: The statement is contradictory in terms. "The practice on occasion."

MR. JACOBY: I apologize, your Honor.

THE COURT: Is it the practice or isn't it the practice.

Q In those instances where the author retains the

right to negotiate for the motion picture rights, does the publisher ever share in the proceeds derived from the sale of the motion picture rights?

A I can only speak for Dodd Mead. The answer is no.

Q A very unusual company.

In searching your correspondence file, as Mr. Fuss apparentlyasked you to do, how far back were you able to find correspondence in connection with this work?

A I found correspondence relating only to the copyright of this particular work.

Q By that you mean the original copyright in 1925?

A Right. The renewal and the contract.

Q What correspondence did you find with respect to the renewal?

A The renewal certificate.

I didn't find any correspondence with respect to renewal.

Q So there is no correspondence in your file with respect to the renewal?

A Not in the office at 77 Madison Avenue. We have a warehouse, but I was unable to get to it yesterday. I didn't have time to find out.

Q And you don't know what is there?

A I don't know what is there.

MR. JACOBY: No further questions.

THE COURT: Do you have anything you wish to ask?

MR. SELKIRK: No, your Honor, no questions.

THE COURT: Anything else you wish to ask?

REDIRECT EXAMINATION

BY MR. FUSS:

Q Mr. Dodd, you say you are in charge of the copyright section of your firm?

A Yes.

Q Can you tell us what the usual custom is with respect to the renewal of a novel? Would you in the normal course of events, when 28 years have elapsed and you were filing an application, do you usually send it to the author for signature?

A No.

MR. FUSS: No further questions.

RECROSS-EXAMINATION

BY MR. JACOBY:

Q And by that answer, you mean you normally have someone in your company sign it and send it back?

A Yes.

MR. JACOBY: No further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call the next witness, please.

MR. FUSS: Your Honor, we have no further witnesses. We had subpoenaed another witness and I have been advised by his attorney that he would not be here.

THE COURT: You say he will not be here or he will be here?

MR. FUSS: I had originally been advised that he would be here but I was informed yesterday that he is still out of the country and won't be here until the 12th.

However, I have spoken to Mr. Jacoby and we have agreed on the substance of a stipulation as to what that witness would testify to.

We are willing to put that on the record in lieu of his testimony.

THE COURT: All right.

Why don't you do that now.

MR. FUSS: The firm of Audio Film Center, also known as Audio Brandon, which circulates for rental motion pictures, has advertised in its catalog for rental the film The Son of the Sheik.

We have here in court catalogs from this firm from 1965 through this year. These catalogs contain the listing for Son of the Sheik.

The latest catalog that we have here is 74-75. and the earliest is 65-66.

I show Mr. Jacoby the place where Son of the Sheik is listed.

THE COURT: I take it, gentlemen, the stipulation is that the catalogs of Audio reflect from 1965 through the present and into the future this movie is available, is that correct?

MR. JACOBY: Yes.

THE COURT: Do you so stipulate?

MR. JACOBY: Yes.

I would like to know, is this pursuant to any license from Mr. Killiam?

MR. FUSS: No authorization has been given by Mr. Killiam to this company.

We wish further to stipulate that no legal action has been taken by Mr. Rohauer to prevent this company from distributing this film.

MR. JACOBY: I will so stipulate that no action has been brought to date.

THE COURT: Wait just a moment, sir.

Do you so stipulate to the entire statement made by your adversary?

MR. JACOBY: Well, that no such action has been

brought to date, yes.

THE COURT: The stipulation embraced more than that, it seems to me.

Read it,please.

(Stipulation read.)

THE COURT: I take it there is no question both sides stipulate to that which was just read.

Is there or isn't there?

MR. JACOBY: Well, there is no question other than the fact, your Honor, that the catalog for 65-66 is here, and the next one is for 70-71.

Whether there are any in between, I don't know. But I will stipulate that these four catalogs that counsel has produced do contain references to this picture.

THE COURT: All right, read the remainder.

(Stipulation read further.)

THE COURT: I take it then the stipulation is then Audio has no license to show this film of Mr. Killiam, is that correct?

MR. JACOBY: Yes.

THE COURT: Read the rest.

(Stipulation read further.)

THE COURT: I take it that you do not object to the stipulation?

MR. SELKIRK: No, your Honor, I do not.

THE COURT: You, as well, so stipulate?

MR. SELKIRK: Defendant Bowery Savings Bank joins in the stipulation, your Honor.

MR. FUSS: In addition, I would like to read into the record the deposition of Mr. Rohauer, page 19, discussing his relationships with Audio Film Center.

MR. JACOBY: I object.

MR. FUSS: May I have a moment, your Honor, to find the reference to connect these.

THE COURT: Yes.

MR. FUSS: On page 200 of the deposition. I will read that into the record first and then I will go back to what I was going to read.

Page 200 of the deposition, line 4:

"Q Mr. Rohauer, is Fleetwood the same as Audio Brandon, the film distribution company? Are they the same?

"A Yes, they merged together. Many companies merge."

Page 19, line 15, referring to this company.

"Q Did you receive money from them" --

MR. JACOBY: Referring to which company, sir? Fleetwood?

MR. FUSS: Fleetwood, Audio Brandon.

All right?

MR. JACOBY: Yes.

MR. FUSS: I will continue reading.

"Q Did you receive money from them for the rental of those films or that film?

"A I suppose there were some rentals in our reports. It wasn't broken down film by film so I can't tell you exactly.

"Q You received reports from them?

"A Yes.

"Q How frequently did you receive the reports?

"A About every month. Some reports are monthly, some are quarterly. I don't know which that was in.

"Q And those reports are just lump sums?

"A Yes.

"Q It doesn't give you any breakdown as to what they distributed?

"A No."

On page 54 of Mr. Rohauer's deposition, line 12:

"Q Well, you have testified that you received certain lump sums from --

"A From Fleetwood Films.

"Q -- Fleetwood Films, is that right?

"A Yes.

"Q And part of that lump sum was as a result of the showing of Son of the Sheik? Is that right?

"A I said probably. It is a lump sum; I don't know what the bookings were."

At this time I would also like to stipulate with respect to the fact that no deposition was taken of Cecil Rull, and that we are informed through Mr. Jacoby that Cecil Rull is in a retreat in York since 5-30-1969 and that she is under the protection of the Court of Protection since September 14, 1969 and incapable of answering questions.

THE COURT: Do you so stipulate?

MR. JACOBY: Yes, sir. Except I would like to add that, that an order of that court has been obtained permitting the institution of this action by my firm.

THE COURT: Do you agree with that?

MR. FUSS: Yes, sir.

THE COURT: All right.

MR. FUSS: Off the record for a moment.

THE COURT: No, the only person who decides what is off the record in this court is myself.

MR. FUSS: I apologize, your Honor. I would

like to introduce into evidence for the Court to take judicial notice of a Senate Bill 1361 for 1973 with respect to the Copyright Reform Act, part of which is referred to in my brief.

THE COURT: Yes, I read your memorandum yesterday and you make reference to that.

It has not as yet been passed, I gather.

MR. FUSS: That is correct, your Honor.

THE COURT: It is also a perennial blossom.

MR. FUSS: There is a problem in reforming the copyright law, a general revision, that has been a problem for a number of years.

THE COURT: Yes.

(Defendant Killiam Exhibit "I" marked for identification.)

xx

THE COURT: That bill, as I remember your memorandum, would codify the holding of the Court of Appeals in this circuit, would it not, in the case you mentioned?

MR. FUSS: Yes, it would make a distinction between the recorded case and our situation. It would codify that.

THE COURT: Yes.

What practical weight do you expect me to give the fact that the bill was introduced in the Congress?

MR. FUSS: I think in the absence of --

THE COURT: Wouldn't it tend to lead you to the impression that that is not the law, or whatever, if someone feels it is necessary to introduce it?

MR. FUSS: I think in the absence of a case in point dealing with this particular kind of situation it has at least the weight of some of the commentaries that are referred to by the plaintiff in this action.

THE COURT: I respectfully differ with you about that. I will, of course, take notice of the fact that such a bill has been introduced. I must tell you though -- and I state for the record -- that I don't see that as being terribly weighty in the decision as to what the law is here.

I am sure I don't have to tell you that the writings of the commentators in any specialized field are entitled to such weight as the Court wants to give them, which in turn is based upon the force and the logic and the expositive power of such argument.

MR. FUSS: I just want to say, your Honor, that obviously the commentators are dealing with an area of what the law should be with respect to a particular item and with respect to that they have given their thought as to what they feel would be the best approach.

And I submit that here we have another view as to what would be the best approach as to what the law should be rather than what the law is.

THE COURT: I don't think I will enter into a lengthy disputation with you about that.

MR. FUSS: I rest, your Honor.

THE COURT: How about the Bowery Savings Bank?

MR. SELKIRK: I rest, your Honor.

MR. JACOBY: Your Honor, with reference to this material we just heard from counsel for Mr. Killiam and the deposition he has just read and the reference to this gentleman Bresnick, who has not appeared, I would just like permission to take two minutes to read something.

THE COURT: Take as long as you wish.

MR. JACOBY: Your Honor, Mr. Fuss has heretofore read to you from Mr. Rohauer's deposition at page 200 commencing at line 4. I would like to pick off where he left off on line 9. Question by Mr. Fuss:

"Q Do you know whether they"-- being Fleetwood and Audio Brandon-- "are distributing Son of the Sheik?

"A I asked them the question. They claimed no. I

I asked the question because it is in their catalog.

"Q Did you say it is in their catalog?

"A Yes.

"Q Which catalog is that?

"A I don't know if it is in the current, but it is one, the recent one, and I noticed it myself.

"Q Do they put out a catalog every year?

"A I don't know if it is every year, but from time to time.

"Q You saw it in the current catalog?

"A I wouldn't say it was current. I wouldn't say which year it was, but they claim they are not distributing the film.

"Q Did you write to them?

"A No, I just called them up.

"Q You spoke to whom?

"A Myron Bresnick, the president of the company."

In addition to that, your Honor, I would like, since Mr. Bresnick is not here, to introduce in evidence a copy of the original of a letter dated February 28, 1972, from Myron Bresnick of Fleetwood Films to the plaintiff Raymond Rohauer, a copy of which is in possession of Mr. Fuss.

THE COURT: Have it marked for identification, please.

jw:mg 66

(Plaintiff's Exhibit 5 marked for identification.)

MR. JACOBY: May I read the letter, your Honor?

THE COURT: Are you offering it?

MR. JACOBY: Yes.

MR. FUSS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 5 received in evidence.)

(Mr. Jacoby read from Plaitiff's Exhibit 5 in evidence.)

MR.JACOBY: That's all.

THE COURT: Is there anything else by any party?

Do all parties rest?

MR. JACOBY: Yes.

MR. FUSS: Yes.

MR. SELKIRK: Yes, your Honor.

MR. FUSS: If your Honor please, I would only request that I be given time to submit supplemental briefs.

THE COURT: You are going to be given this. There is no question about that.

Let me ask you, Mr. Jacoby, your adversary

cites in his memorandum a number of cases.

MR. JACOBY: Yes, sir.

THE COURT: Which tend to lead one to believe that a long period of failing to enforce a copyright in the knowledge that it is being used may constitute an abandonment under the law.

Have you read this memorandum?

MR. JACOBY: Yes, of course, sir.

THE COURT: Then you know what I am talking about.

MR. JACOBY: Yes.

THE COURT: Would you please respond to tht? Your point of view as expressed in your memorandum was that it takes some affirmative action, some positive act of abandonment.

His memorandum suggests that that may not be the case.

MR. JACOBY: Well, your Honor, the case on which he principally relies, which is the Stuff Case --

THE COURT: It seems to me there is more than one.

MR. JACOBY: The principal case is the Stuff Case, I think, in this circuit, a case where a cartoon, I believe, and the cartoonist had for a great number of

years permitted copies of the cartoon to be circulated without notice of copyright.

And the court hold in that case that having knowingly permitted the work to be circulated without a notice of copyright that he had abandoned his copyright and as a result his widow, who was asserting a claim against someone who reproduced it many years later, had no claim.

I don't think that is at all relevant.

THE COURT: Why not?

MR. JACOBY: Because there was no notice on copyright on copies that were circulated with the consent of the cartoonist.

THE COURT: Do you think failure to perform notice--

MR. JACOBY: Is of the essence. I think so, your Honor. I think the Hampton case in the 9th Circuit which also went to the Supreme Court andwhich I rely on principally where there was a huge delay and constant showings of this silent picture is really controlling here.

THE COURT: The Stuff case is 1965 in this circuit and therefore of infinitely more persuasive ability than anything the 9th Circuit puts out.

MR. JACOBY: I agree if it were in point, it would be far more persuasive.

MR. FUSS: Your Honor, the case does not turn on the notice part of it. The case turned on the question whether there was such evidence of abandonment, evidence of lack of policing, that the Court felt that that was sufficient to indicate the intention of abandonment.

i think that is what is involved.

In the Hampton case, the 9th Circuit, I distinguished that in the brief and there are many, many distinctions there; nowhere does it approach the kind of complete use saturation with millions of people seeing it as in our case.

There, there were a few isolated showings and there was specific testimony in that case that the Paramount, I believe the plaintiff, did not become aware of its use until I think 18 months prior to the action being taken and immediately after they sent a letter.

So it doesn't compare in the wide use of the facts as to our case and I think our case is right in point in terms of Stuff and it doesn't turn on thequestion of the copyright notice.

Obviously this was distributed without a copyright notice in Cecil Hull.

jw:mg 70

Presuming that we were cut off in 1952, with respect to our rights, then there should have been a copyright notice since 1952 in Cecil Hull, which it wasn't.

So it was circulated without her copyright notice for the last 18 years -- this motion picture.

MR. JACOBY: Well, Mr. Fuss, your most recent statement just isn't the fact. After all, the prints you have been distributing bear the original copyright notice and you know perfectly well that it is not necessary to have a renewal notice as long as the original notice is on the film.

MR. FUSS: They bear our copyright notice, motion picture copyright notice.

MR. JACOBY: Yes, that is a wholly different copyright you are talking about.

THE COURT: Would you please be seated?

MR. JACOBY: Sorry, your Honor.

THE COURT: Is it the law that when the owner of a copyright dies I gather in substance you, having read Mr.Jacoby's memorandum, that the law is then interested in preserving any property in that copyright to the family of the creator of the work and, therefore, any licenses, options, whatever, for particular purposes, upon their own completion terminate. And if I understand his argument correctly, it is that it is beyond the power of the creator

BEST COPY AVAILABLE

of the work to grant a period greater than the original period of copyright if that greater period exceeds the life of the author, or whatever you want to call a person who created the work.

Do I understand your point, Mr. Jacoby?

MR. JACOBY: Precisely, your Honor.

THE COURT: Would you please respond to that?

MR. FUSS: Obviously this is an anomalous situation.

THE COURT: A what?

MR. FUSS: An anomalous situation, a peculiar situation. It is a court-devised doctrine of a new estate really saying something new happens at that time.

THE COURT: Right.

MR. FUSS: I agree that it is intended to protect the relatives, the descendants of the original author. How far this doctrine goes in cutting off rights is a question for this Court to decide in part here and it should be as restrictive in cutting off those rights as possible because a bargain was made.

The Court in the recording case went as far as to say a license was granted for one use of this artistic work and you cannot go back to the original artistic work and borrow once again in creating another

artistic work after the period has expired.

It didn't say that the first borrowing cannot be continued. In other words, if it would be a book that we are dealing with --

THE COUNT: I understand that in the case of Traviata, Butterly, as it was, they made one version and then afterwards they sought to make another version.

MR. FUSS: That is correct, your Honor.

THE COURT: That is not the case here. Your point is you are showing the same film.

MR. FUSS: If this would be a point there would be no problem of selling.

THE COURT: Why does that reasoning not apply? Assuming this is not exact factually on all fours with that case, why doesn't the reasoning apply here?

MR. FUSS: Because it would be more analogous--

THE COURT: Again let me state I understand it to mean when a person buys a subsidiary right such as -- I am learning a whole new vocabulary in this case -- a motion picture copyright, that if it includes an extension beyond its original term, in substance, such a person, according to what Mr. Jacoby contends, buys it at his peril; namely, that if the person who is the original grantor, or whatever it is called, dies, certainly during

djw:mg 73

the period of the original grant he is out of luck in terms of his extension. That is Mr. Jacoby's point and I invite your response.

MR. FUSS: Let me put it this way.

If this would be a book that we were dealing with there would be no question we could continue to sell the copy of the book that we had made even in the renewal period. I don't think Mr. Jacoby would quarrel with that.

But because we have a new form of art here and this form of art is a motion picture and an entirely independent contrince has grown up with respect to that motion picture which says that each screening is a new act, because of that Mr. Jacoby has this argument.

But there is no new creative artistic borrowing from the original work.

THE COURT: No, I understand that; you made that clear.

MR. FUSS: What I am saying is that the distinction--

THE COURT: I am just asking-- and obviously my mind is in no way made up about anything at this point -- what difference does it make?

MR. FUSS: I say to you it is more analogous -- the same difference as it makes between a book which has

been published--

THE COURT: Wait just a minute. You talk about books. If the publisher of a book had ten thousand copies left at the end of the period presumably he would be entitled to get rid of those, sell those books.

MR. FUSS: That is correct, your Honor.

THE COURT: By the same token I would greatly doubt whether he could run off another printing after expiration; is that correct?

MR.FUSS: I don't know, your Honor, with respect to that. He cannot again use it. Perhaps he cannot run off another printing. He could use the same artistic work though in terms of getting rid of what he had under the license.

THE COURT: Yes.

MR. FUSS: Here we had a step further that a new artistic work was created in reliance on the first one and there was an independent copyright of that. And we have also the situation where the plaintiff cannot show this film because he doesn't have our copyright. We have an independent copyright in the motion picture and the plaintiff hasn't contended that he is entitled to show that motion picture.

So what he only has --

THE COURT: He has contended quite obviously, this is what the lawsuit is about, that you can't show the motion picture without paying him for his copyright.

MR. FUSS: That is correct, your Honor.

THE COURT: Gentlemen, how much more time do you want to get in whatever memoranda, proposed findings and conclusions?

MR. JACOBY: It would be helpful, your Honor, if the Court Reporter can tell us --

THE REPORTER: Two weeks.

THE COURT: It will not be earlier than a couple of weeks.

Gentlemen, I cannot express to you with enough force how overburdened the Court Reporters are in this court and what a job above and beyond what anybody has a right to expect of them they are doing. So if he says two weeks, I am afraid you can wince or otherwise express your disapproval, but that is the way it is.

MR. JACOBY: I hate to hold you up that long.

THECOURT: That is all right. I have got other things to decide.

Knowing that you will receive the record in approximately two weeks, when do you propose to submit findings and conclusions and such memoranda as you have to?

MR. JACOBY: Three weeks from today?

MR. FUSS: That will be all right, your Honor.

MR. SELKIRK: Three weeks is fine with us, your Honor.

THE COURT: What you are saying is a week after you get the minutes?

MR. JACOBY: Yes.

THE COURT: All right, sir.

Decision reserved.

...

I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
"Paul Killiam	5			
Raymond Rohauer	16			
Jonathan Dodd	42	46	55	55
"Mr. Rohauer	59			

EXHIBIT INDEX

	Identification	In Evidence
Plaintiff		
1		6
2		9
3		9
4	14	
Defendant Killiam		
A	14	
B	14	15
C	30	30
D	33	33
E	43	43
F	44	44
G	45	46
H	45	46
I	62	

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

RAYMOND ROMAUER and CECIL W. HULL,

Plaintiffs,

-against-

KILLIAM SHOWS, INC., PAUL KILLIAM, EDUCATIONAL BROADCASTING CORPORATION and THE BOWERY SAVINGS BANK,

Defendants.

----------x

OPINION

71 Civ. 4183

#4079

MICROFILM
AUG 1 1974

APPEARANCES

Schwartz, Burns, Lesser & Jacoby, New York City (Herbert P. Jacoby, Robert E. Suggs, of counsel) for plaintiffs.

Abraham M. Fuss, New York City, for defendants Killiam Shows, Inc., Paul Killiam, and Educational Broadcasting Corporation.

Nicholas A. D'Onofrio, New York City (Alexander M. Selkirk, Jr., of counsel) for defendant Bowery Savings Bank.

BAUMAN, D. J.

This is an action for copyright infringement brought pursuant to the Copyright Act, 17 U.S.C. § 1 et seq. The action was tried before this court, sitting without a jury, and what follows constitutes my findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. 1/

Some time prior to May 15, 1925, one Edith Maude Hull, a British subject, wrote a novel entitled "The Sons of the Sheik".

The work was published in the United States on or about May 15, 1925 by the firm of Small, Maynard & Co., which duly registered the work in the United States Copyright Office and received thereby a Certificate of Copyright Registration bearing the number A:855221. On or about November 23, 1925, Small, Maynard transferred the United States Copyright to the author. By agreement dated December 7, 1925, she assigned the motion picture rights to one Joseph H. Moskowitz. The agreement provided, in pertinent part, that "[t]he Seller hereby grants, sells and assigns to the Purchaser all the motion picture rights in and to the said story for the entire world, together with the sole and exclusive right to make motion picture versions thereof ..." The agreement further provided that the author would procure the renewal of the copyright prior to its expiration and would thereupon assign the motion picture rights for the renewal term to Moskowitz.

The succeeding histories of the novel and motion picture diverge at this point, and it will be useful to consider each separately. Edith Hull, the author, died in 1943. On May 22, 1952, the United States Copyright in the novel was renewed in the name of Cecil Winstanley Hull, a plaintiff herein, who was the author's sole surviving child. A Certificate of Renewal Copyright was duly issued in her name, bearing the number R:95176. On May 6, 1965, Cecil Hull assigned to Raymond Rohauer, plaintiff herein, "all of [Hull's] right, title and interest (if any) in and to the motion picture and television rights of every kind and character throughout the world and in all languages in a certain literary and/or dramatic property entitled 'Sons of the Sheik' ...." This assignment was

registered in the United States Copyright Office on May 18, 1965.

Pursuant to the December 7, 1925 agreement between Edith Hull and Joseph Moskowitz, a motion picture entitled "The Son of the Sheik" starring Rudolph Valentino was produced and released for exhibition in the United States in 1926. It is undisputed that the motion picture is based on the Hull novel. 2/ On August 24, 1926, the picture was registered in the Copyright Office by and in the name of Feature Productions, Inc., as assignee of Moskowitz. Its certificate bore the registration number L:23046. This copyright was renewed on March 18, 1954 by and in the name of Art Cinema Associates, Inc., the then proprietor of the copyright. The renewal certificate was numbered R:127185. By agreement dated September 14, 1961 Art Cinema Associates, along with Mrs. Emil Jensen and Walton & Co., sold their interests in the motion picture, including the renewal copyright, to Gregstan Enterprises Inc. Some time thereafter, Gregstan assigned all such interests, including the renewal copyright, to Killiam Shows, Inc., one of the defendants. Paul Killiam, another defendant, is and was an officer, director and sole stockholder of Killiam Shows.

On July 13, 1971, the motion picture was shown on television station WNET, which operates on Channel 13 in the New York metropolitan area and which is owned by the Educational Broadcasting Corporation (hereinafter "Broadcasting"), another defendant. The showing was made possible by a grant of $75,000 from the Bowery Savings Bank, also a defendant, which was underwriting a series of 12 motion pictures entitled "The Silent Years", all of which were

to be shown on WNET. The film required for this exhibition was made by Broadcasting from a print made available to it by Killiam Shows; the consideration paid for the use of the print was furnished to Broadcasting by Bowery.

The July 13 showing occurred without any license from plaintiffs Rohauer or Hull.[3/] Several years earlier, by letter of counsel dated May 12, 1966, Rohauer had informed Killiam of his assignment from Cecil Hull and advised him that any showing of the picture would constitute an infringement of his rights. On July 12, 1971, the day before the first television showing, Rohauer's counsel informed Broadcasting that the scheduled showing would constitute an infringement of rights granted him by Cecil Hull. The instant action was commenced on September 22, 1971, and claimed copyright infringement based on the July 13 showing.

After the action was commenced, the film was shown twice more on Channel 13 as part of "The Silent Years" series: on October 11 and October 16, 1971. By agreement of the parties, the complaint is deemed amended to include the additional showings as alleged acts of infringement.

Also relevant here is a brief recitation of the history of the motion picture's use prior to July 13, 1971. It is undisputed that between 1952 and 1965 Rohauer was responsible for numerous showings of the motion picture, a print of which he had purchased from the president of Art Cinema Associates. It is also undisputed that the motion picture had been shown extensively in the United States as part of a series entitled "Silents Please" which began

in 1960; Killiam Shows or its predecessors in interest controlled by Killiam had furnished the print for such showings. The film was also shown on television in Great Britain between 1962 and 1966 as part of the "Silents Please" series. There is no evidence that Cecil Hull ever objected to any of these uses, or that she was aware of them.

I.

As the foregoing statement of facts indicates, both sides claim ownership of the motion picture rights to "The Son of the Sheik". The principal legal question which the case presents, then, is whether the grant of the motion picture rights from Edith Hull to Joseph Moskowitz, to which Killiam Shows has succeeded, constituted proper authorization for the showings which took place over Channel 13. Defendants, of course, claim that it does. Plaintiffs, however, argue that the subsequent renewal of the copyright by Cecil Hull following Edith Hull's death extinguished any rights which Moskowitz and his successors in interest acquired. My understanding of the applicable authorities convinces me that plaintiffs' view is correct.

It has been held in this Circuit that when an author of a copyrighted work dies prior to the expiration of the copyright term, and the next of kin applies for renewal before the term expires, he acquires "a new and independent right in the copyright, free and clear of any rights, interests, or licenses attached to the copyright for the initial term." Fitch v. Shubert, 20 F.Supp. 314 (S.D.N.Y. 1937); G. Ricordi & Co. v. Paramount Pictures, 189

F.2d 469 (2nd Cir. 1951); Silverman v. Sunrise Pictures Corp., 273 F. 909 (2nd Cir. 1921). See also Bricker, "Renewal and Extension of Copyright", 20 So. Calif. L.Rev. 23 (1955) at pp. 27-31. I also find highly persuasive the views of the leading text writer in this field: "If the author (or other assignor of the renewal expectancy) is not living when the renewal rights vest, then those persons who by statute succeed to the renewal rights are not bound by any assignment executed by the author (or by any assigning member of a prior renewal class) so that the assignee takes nothing." Nimmer on Copyright, § 117.3.

Nimmer has also addressed the precise question with which I am confronted here:

> "A motion picture producer whose rights in the 'underlying' work terminate at the expiration of the original term may not thereafter make additional 'prints' of the film, nor may he reproduce a new motion picture based upon the same work. Both of such acts would constitute unauthorized copying. A more difficult question is whether the mere exhibition in theatres or on television of previously created film prints constitutes an infringement of copyright in the underlying work. It would seem that such conduct would constitute an infringement of either the right to make copies, the right to make other versions, the right to dramatize a non-dramatic work, or the right to perform a 'transcription or record' of a non-dramatic literary work." Nimmer, supra, § 118.

Defendant argues, as I understand it, that the motion picture is an independently copyrighted derivative work, the use of which cannot be controlled by the holder of the renewal copyright in the underlying work. Although the view is hardly illogical, I can find no support for it in the applicable precedents; as I have already noted, such precedents as do exist repudiate this

argument. One case that directly considered the supposed "independence" of a derivative work is Sunset Securities Company v. Coward-McCann, Inc., 47 Cal. 2d 907, 306 P. 2d 777 (1957), reversing 297 P.2d 137 (Dist.Ct. of Appeal, 2nd Dist. 1956). In that case a publisher which was the proprietor of a duly copyrighted novel sold the motion picture rights to a film company under an agreement which gave the purchaser such rights for a ten year period. The agreement further provided that all rights would revert to the publisher at the end of that period unless the purchaser paid an additional sum. A motion picture was duly made, and, after several proceedings not relevant here, the purchaser's successor in interest brought an action against the publisher to "quiet title" to the motion picture and to confirm its right to exploit it beyond the expiration of the ten year period. The District Court of Appeal accepted plaintiff's argument, and in so doing employed reasoning strikingly similar to that of the defendants here: "the film 'Ruthless' was actually made and copyrighted within the ten year period. The film is a separate entity from 'Prelude to Night' [the novel]. It may be separately copyrighted. 17 U.S.C.A. § 5(e). The agreement conveyed to [the purchaser] the right to copyright the film. As a copyright endures for twenty eight years ..., defendant's contention that the copyright taken out on 'Ruthless' would revert to defendant at the end of ten years is implausible." 297 P.2d at 140. The California Supreme Court unanimously reversed this holding. Although its opinion relied principally on the construction of the original agreement, the court clearly rejected the lower court's theory that motion picture rights, once granted,

cannot revert to the proprietor of the underlying work if a motion picture is made and copyrighted by the grantee.

Plaintiff also finds support for his position in the proposed revision of the Copyright Law which has been before Congress since 1965. [4/] § 203(b)(1) of a recent incarnation of that bill provides as follows:

> "A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant."

Although this might well be deemed an admirable statement of what the law should be, it is scarcely persuasive of what the law is. As our Court of Appeals has noted, the proposed revisions of the Copyright Act command adherence only insofar as "the result which the proposed legislation would compel is not precluded in any way by the decisions rendered under the present Copyright Act." Goodis v. United Artists Television, Inc., 425 F.2d 397 (2nd Cir. 1970). My reading of cases such as Fitch and Ricordi convinces me that they are inconsistent with proposed § 203(b)1. I therefore can accord it no weight, and must reject defendants' argument that the owner of an independently copyrighted derivative work may continue to exploit it beyond the original term of the underlying work.

II.

My discussion in the preceding section suffices to establish that, save for the affirmative defenses to be considered below, plaintiffs' copyright was infringed by the showings of "The Son of the Sheik". The fact that the showings were broadcast over

Broadcasting's facilities with the aid of a print furnished by Killiam Shows establishes the liability of those two defendants. It is well settled — and not disputed by Broadcasting here — that a broadcasting company which broadcasts infringing material over its facilities is liable for infringement. Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478 (9th Cir.), cert. dismissed, 368 U.S. 801 (1961). A more difficult question is whether defendants Paul Killiam and Bowery Savings Bank can be held liable as contributory infringers, and it is to that question I now turn.

It is agreed that Killiam is an officer, director, and sole stockholder of Killiam Shows. From this plaintiffs argue that he is the "alter ego" of Shows, or, as they phrase it, that he is "the defendant Shows doing business in corporate form." Plaintiffs claim further that Killiam "completely dominates and controls its [the corporation's] operations and is the sole beneficiary of its acts." Unfortunately, there is nothing in the record to support any of these assertions; all that is before me is the statement in the stipulation of facts that Killiam is an officer, director, and sole stockholder of Shows. At trial, plaintiffs rested without introducing any evidence of the extent of Killiam's activities. I can thus scarcely infer that Killiam "completely dominates and controls" the activities of the corporate defendant. Nor, I have concluded, can I find him liable as a contributory infringer.

A contributory infringer has been defined as "one who, with knowledge of the infringing activity, induces, causes, or

materially contributes to the infringing conduct of another." Gershwin Publishing Corporation v. Columbia Artists Management, Inc., 443 F.2d 1159 (2nd Cir. 1971). Corporate officers will be held liable for the infringing acts of the corporation "if they personally participated in the acts constituting infringement." H.M. Kolbe Co. v. Shaff, 240 F.Supp. 588 (S.D.N.Y.), affd., 352 F.2d 285 (2nd Cir. 1965); Hagemeyer v. Insect-O-Lite Co., Inc., 291 F.2d 696 (6th Cir. 1961). A recent gloss on the meaning of personal participation has been provided by Judge Moore, sitting by designation in the Eastern District of New York. He held that the president of an infringing corporation could be held liable simply because "he had the right and ability to supervise the infringing activity and also had a direct financial interest in such activities." L & L White Metal Casting Corp. v. Cornell Metal Specialties Corp., 353 F.Supp. 1170 (E.D.N.Y. 1972).

Courts have rarely imposed liability on a corporate officer for the infringing acts of the corporation without some inquiry into either the officer's actual participation or, at the very least, into the nature of his function within the corporation. In Shapiro, Bernstein & Co. v. Gabor, 266 F.Supp. 613 (S.D.N.Y. 1966), the court held that "[w]hether defendant [the corporation's president] did personally participate can only be determined after resolution of that issue of fact upon a trial." In other cases in which corporate officers have been found liable, these findings have been based on careful evidentiary determinations regarding the scope of the officer's role in the infringement. See, e.g., Morser v. Bengor Products Co., 283 F.Supp. 926 (S.D.N.Y. 1968); Warner Bros. - Seven

Arts, Inc. v. Kalantzakis, 326 F.Supp. 80 (S.D.Tex. 1971). In the instant case, I am unwilling to impose liability on defendant Killiam based on nothing more than speculation regarding his participation in the corporation's activities. That he is officer, director, and sole shareholder does not lead ineluctably to the conclusion that the corporation is his alter ego. I am unaware of any copyright infringement case that has imposed liability on a corporate officer on such a meager factual record. Accordingly, the action is dismissed as against defendant Paul Killiam.

III.

With regard to the liability of the Bowery Savings Bank, I should note at the outset that I attach no weight to its self styled role as an "underwriter" rather than a "sponsor" of the televised showings. Programs shown on educational television stations, such as Channel 13, do not have sponsors in the conventional sense; rather, a company which has contributed toward the presentation is usually permitted a brief and rather sedate announcement of its contribution, which usually appears at the end of the program. Here, in addition, the entire "Silent Years" series was extensively advertised in the press, on public buses, and in other media; all such advertising bore Bowery's name. It is also conceded that Bowery distributed posters bearing its name as well as a still photograph from the motion picture. Although Bowery was unable to engage in the crasser forms of self promotion to which commercial television has accustomed us, I find that its participation in the financing and promotion of the series qualifies it as a sponsor.

A sponsor will be held liable for copyright infringement if it had the power to supervise and control the content of the programs. Davis v. E.I.DuPont de Nemours & Co., 240 F.Supp. 612 (S.D.N.Y. 1965); Bevan v. Columbia Broadcasting System, Inc., 329 F.Supp. 601 (S.D.N.Y. 1971); Nimmer, supra, § 134.1. Plaintiffs concede that Bowery was unaware of the infringement at the time of the July 13, 1971 showing of the motion picture and accordingly do not seek to impose liability for that particular act. They do contend, however, that Bowery is liable for the October 11 and October 16 showings. By that time the instant action had already been filed, and Bowery's lawyers had received a copy of a letter from plaintiffs' counsel to Broadcasting's counsel warning against any further showings. Plaintiffs argue that Bowery, having received such notice, must be found to be a knowing and deliberate participant in the infringement.

Although Bowery was unquestionably apprised of the infringement charges, I am not satisfied that their activity reaches the "control and supervision" standard of Davis and Bevan. Again, as with Killiam, the problem is largely one of proof. Plaintiffs have offered some evidence of Bowery's advertising activities; they have not, in my view, offered sufficient evidence of the nature of Bowery's relationship with Broadcasting or of the extent of its supervision over the series. The facts of Davis v. E.I.DuPont de Nemours & Co., supra, offer an instructive contrast. It was there established that the sponsor's approval was required at several stages in the production of the television program. Because the sponsor saw the first draft of the television script and participated

in story conferences, the court found it had the power to determine the content of the program and that it had exercised that power. It was not, the court concluded "merely an advertiser buying time on a program produced by a station over whom it had no control." 240 F.Supp. at 632. On the record before me, I have no way of knowing how active or passive Bowery was with regard to the production of "The Silent Years". I cannot determine, for example, whether it participated in selecting the films for the series or whether it simply agreed to finance a package already devised by Broadcasting or some third party. Davis suggests that such determinations are highly relevant to deciding whether a sponsor is a contributory infringer. Because plaintiffs have failed to sustain their burden of proof, the action is dismissed as against defendant Bowery.

IV.

I shall now consider the various affirmative defenses asserted by the defendants. The first of these is abandonment. Nineteen years elapsed between 1952, the year Cecil Hull renewed the copyright to "The Sons of the Sheik" and 1971, the year this action was commenced. During that interval the motion picture was shown frequently on television in both Great Britain and the United States, but at no time did either Cecil Hull (prior to 1965) nor Rohauer (after 1965) raise any objection or make any attempt to restrict the motion picture's exhibition. This inaction, defendants contend, amounted to an abandonment of the copyright.

It is well recognized, however, that abandonment must be manifested by some overt act indicative of an intent to surrender

rights in the copyrighted work and to allow the public to copy it. Mere inaction is not a sufficient manifestation of such intent. National Comics Publications Inc. v. Fawcett Publications Inc., 191 F.2d 594 (2nd Cir. 1951); Marvin Worth Productions v. Superior Films Corp., 319 F.Supp. 1269 (S.D.N.Y. 1970); Nimmer, supra, § 146. A case which closely parallels this one is Hampton v. Paramount Pictures Corporation, 279 F.2d 100 (9th Cir. 1960), cert. denied, 364 U.S. 882 (1960). In that case plaintiff's predecessor in interest, the assignee of a copyrighted motion picture, had licensed Kodascope in1927 to produce prints of this film, as well as others, for "non-theatrical exhibitions". After 1930, however, Kodascope rented and sold such prints without restriction. Defendant purchased a print of the motion picture in question and, beginning in 1942, exhibited it, along with others in his theatre. Plaintiff did not object to these showings until 1954. The Ninth Circuit held that despite a lapse of 27 years, plaintiff had not abandoned the copyright. Following National Comics, supra, it held that abandonment required some overt act indicative of an intent to surrender. It further concluded that "[e]vidence of such an overt act is here totally lacking. There was at most lack of action." 279 F.2d at 104. The most that can be found in the present record is a lack of action as well, and I therefore find the defense of abandonment unavailing.[5/]

Defendants' trial brief also contains what appears to be a half-hearted reference to the defense of estoppel. The reluctance with which this argument is pressed is thoroughly justified. The Ninth Circuit in Hampton has accurately stated the elements of the

defense: (1) the party to be estopped must know the facts of the defendant's infringing conduct; (2) he must intend that his conduct be acted on or must so act that the party asserting the estoppel (usually the defendant) has a right to believe it is so intended; (3) the defendant must be ignorant of the true facts; (4) the defendant must rely on the plaintiff's conduct to his injury. See also Nimmer, supra, § 147. To state the defense is to demonstrate its inapplicability. There is no evidence that Cecil Hull, for example, knew of the unauthorized showings of the motion picture between 1952 and 1965.[6/] Nor is there any evidence that either Cecil Hull or Rohauer intended their inaction to permit those such as defendants to show the motion picture without authorization. Nor, finally, is there any indication that the defendants relied on plaintiffs' inaction to their detriment. Indeed, the record shows that defendants persisted in showing the motion picture on two occasions even after they had been warned that such action would infringe plaintiffs' copyright. The defense of estoppel must therefore fail.

V.

The next defense asserted has doubtless been dredged up from the antique maxims of equity. It is contended that plaintiffs should not be permitted to prevail because they came into court with unclean hands. The essence of this charge, it seems, is that Rohauer frequently exhibited the motion picture prior to 1965 without obtaining a license from Hull, and thereby engaged in acts of infringement similar to those of which he now accuses the defendants.

Nimmer has noted that the defense of unclean hands "is recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." Nimmer, supra, § 149.2. The requirement that the "transgression" relate to the subject matter of the litigation is susceptible of two interpretations, neither of which aids the defendants' cause in the slightest. In Bentley v. Tibbals, 223 F. 247 (2nd Cir. 1915), the unclean hands defense was held inapplicable because the "transgression" of which the plaintiff stood accused did not harm the defendant or prejudice him in any way. In Jacoby-Bender v. Jacques Kreisler Manufacturing Corporation, 287 F. Supp. 134 (S.D.N.Y. 1968), the court stated that unclean hands would bar the plaintiff only if he was attempting to charge the defendants with liability for an act in which he himself had participated. The Bentley view of the defense completely absolves Rohauer: there is no claim that his showings of the motion picture harmed the defendants. At most, they injured his co-plaintiff, Cecil Hull. Nor do the defendants fare any better by invoking Jacoby-Bender, for it is clear that Rohauer did not participate in or abet any of the acts of infringement with which defendants are charged.

A principle frequently applied to the unclean hands doctrine in patent cases seems equally applicable here. It has been held that defendants cannot avail themselves of the unclean hands doctrine if plaintiff has abandoned its objectionable practices prior to the commencement of the action. Q-Tips, Inc. v. Johnson and Johnson, 108 F.Supp. 845 (D.N.J. 1952), affd., 206 F.2d 144

(3rd Cir. 1953), cert. denied, 346 U.S. 867 (1953); Eastern Venetian Blind Co. v. Acme Steel Co., 188 F.2d 247 (4th Cir. 1951). Here, any wrongful conduct in which Rohauer engaged ceased in 1965, when he purchased the motion picture rights from Cecil Hull. In sum, I find nothing in plaintiffs' behavior so egregious as to warrant a dismissal based on the dubious doctrine of unclean hands.[7/][8/]

VI.

Defendants next argue that even if their showings did infringe plaintiffs' copyright, such showings constituted a "fair use" of plaintiffs' work. Our Court of Appeals considered the nature and justification of the fair use doctrine in Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2nd Cir. 1966), cert. denied, 385 U.S. 1009 (1967). Fair use, it stated, "is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." See Ball, Copyright and Literary Property, 260 (1944). Citing Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2nd Cir. 1964), it noted that "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry." Hence whether an infringer will be entitled to the benefit of the fair use privilege depends on the nature of the infringing work; the most important consideration is whether the distribution of such work "would serve the public interest in the free dissemination of information." Not surprisingly, therefore, the fair use privilege has been most frequently extended to works

in the fields of science, law, medicine, history and biography. See also, Public Affairs Associates, Inc. v. Rickover, 268 F.Supp. 444 (D.D.C. 1967); Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir.), cert. denied, 355 U.S. 907 (1957).

The factors bearing upon a court's inquiry into a fair use defense have been well stated by Judge Lasker in Marvin Worth Productions v. Superior Films Corporation, 319 F.Supp. 1269 (S.D. N.Y. 1970). The court must determine: (1) was there a substantial taking, qualitatively or quantitatively; (2) if there was, did the taking materially reduce the demand for the original copyrighted property; (3) does the distribution of the infringing material serve the public interest in the free dissemination of information; (4) does the preparation of the material require the use of prior materials dealing with the same subject matter. 319 F.Supp. at 1274.

A consideration of but one of these factors is sufficient to dispose of defendants' claim. There is no discernible public interest in the dissemination of "The Son of the Sheik" sufficient to justify the infringement. Even a cursory examination of those cases in which courts have recognized a significant countervailing public interest in infringing material indicates how far short defendants' argument falls. In Time Incorporated v. Berrard Geis Associates, 293 F.Supp. 130 (S.D.N.Y. 1968), sketches based on a film of President Kennedy's assassination were found justified as a fair use because of the "public interest in having the fullest information available" on that event. In Meeropol v. Nizer, 361

F.Supp. 1063 (S.D.N.Y. 1973), the publication of letters of Julius and Ethel Rosenberg was deemed justified by "the continuing interest in and importance of the celebrated Rosenberg case." It can scarcely be argued here that the enduring fame of Rudolph Valentino or the intrinsic literary and historical merit of "The Son of the Sheik" (whatever it may be) serves any public interest sufficient to endow these defendants with the privilege of fair use.[9/]

VII

Defendants next argue that Dodd, Mead, & Co., which in 1952 filed the application for the renewal copyright in the name of Cecil Hull, had no authority to act as her agent.[10/] In pressing this contention they have a heavy burden to bear.[11/] 17 U.S.C. § 209 provides that a registration certificate issued by the Copyright Office is prima facie evidence of all of the facts stated therein. See Jerry Vogel Music Co. v. Forster Music Publisher, Inc., 147 F.2d 614 (2nd Cir. 1945); Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956); Rohauer v. Friedman, 306 F.2d 933 (9th Cir. 1962); Geisel v. Poynter Products, Inc., 295 F.Supp. 331 (S.D.N.Y. 1968); Tennessee Fabricating Co. v. Moultrie Manufacturing Co., 421 F.2d 279 (5th Cir. 1970).

Defendants introduced no evidence tending to overcome the statutory presumption. They did call Jonathan Dodd, an employee of Dodd, Mead whose work involved the supervision of copyrights. He had been an employee of the firm since 1958, and thus had no first hand knowledge of the circumstances surrounding the renewal in 1952. Nor was he able to produce any documents that bore on the question of Dodd, Mead's authority to renew. He did, however,

testify that the firm customarily handled all copyright matters for its authors, and it thus appears scarcely unusual that it processed the renewal of the Hull novel here. In sum, there is nothing in the record suggesting that Cecil Hull sought to deny Dodd, Mead the authority to act as her agent in procuring the renewal of the copyright. The statutory presumption has thus not been overcome, and this defense must also fail.

VIII

Finally, defendants argue that the 1965 agreement by which Cecil Hull assigned rights to Rohauer must be construed to exclude those rights that had previously been assigned by Edith Hull to Moskowitz. They point out that the agreement purported to convey "all the undersigned's right, title and interest (if any) in and to the motion picture and television rights." The agreement also contained the following parenthetical phrase: "the world motion picture rights in such literary property having been sold by Edith M. Hull in December 1925 to Joseph H. Moskowitz." Relying on these passages, defendants contend that the agreement cannot be deemed to convey the motion picture rights previously granted to Moskowitz.

This argument of course ignores the principle that assignments of rights made during the original term of the copyright do not bind those who succeed to the renewal rights. G. Ricordi & Co. v. Paramount Pictures, supra. Furthermore, plaintiffs have proffered a justification for the inclusion of the reference to the Hull-Moskowitz assignment which I find wholly convincing. They point out that the copyright law which obtained in those countries

adhering to the Berne Convention made no provision for copyright renewal. In most such countries, a copyright endured for the lifetime of the author plus fifty years.[12/] A grant of rights under a copyright could continue as long as the copyright subsisted, but in certain countries, of which Great Britain was one, the rights revert to the author's heirs twenty five years after his death.[13/] Plaintiffs thus point out that the 1965 assignment from Cecil Hull to Rohauer took place only twenty two years after Edith Hull's death. Hence Rohauer was at that moment vested only with rights to the work in the United States; in other countries, the motion picture rights would not have reverted to Cecil Hull for at least three more years. The reference to the Edith Hull-Moskowitz-assignment, then, was inserted simply to put Rohauer on notice of these limitations. I therefore decline to adopt defendants' proposed construction of the 1965 assignment.

IX

Only one final point requires resolution. Subsequent to the trial of this action and the submission of post-trial memoranda, defendant Killiam Shows filed a motion to dismiss the action based on res judicata. The facts that underly the motion can be briefly stated. On April 26, 1972 an action was filed in the United States District Court for the Southern District of Iowa entitled Raymond Rohauer and Cecil W. Hull v. The Eastin Phelan Corporation, Civil Action No. 72-25-D. The complaint alleged that defendants Eastin-Phelan, Paul Killiam, and Killiam Shows, Inc. had infringed the plaintiffs' renewal copyright in "The Sons of the Sheik" by offering for sale and selling prints of the motion picture. At some point

the action was dismissed as against Paul Killian and Killiam Shows for want of personal jurisdiction. On February 7, 1974 Judge Stuart of the district court dismissed the action in its entirety pursuant to Rule 37(d) of the Federal Rules on account of Rohauer's failure to appear for a deposition in Iowa. The ruling was affirmed by the United States Court of Appeals for the Eighth Circuit on June 12, 1974, _____ F.2d _____ (8th Cir., 1974).

The defendant now argues that Rohauer is barred by the principle of res judicata from obtaining a favorable judgment on a cause of action which has previously been dismissed with prejudice in another forum. See generally, Lawlor v. National Screen Service Corp., 349 U.S. 322 (1954). Defendant relies in particular on the decision of our Court of Appeals in Nasser v. Isthmian Lines, 331 F.2d 124 (2nd Cir. 1964), which holds that a dismissal pursuant to Rule 37(d) constitutes a dismissal on the merits and therefore bars a later identical cause of action. Hence even though none of Rohauer's claims were litigated in the Iowa action, defendant urges that the dismissal there must bar the instant proceeding.

Plaintiffs correctly note that this argument indicates a failure to perceive the distinction between res judicata and collateral estoppel. The distinction was succinctly stated in Lawlor, supra: "Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and

determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." 349 U.S. at 326. See also, Cromwell v. County of Sac, 94 U.S. 351 (1876); Commissioner v. Sunnen, 333 U.S. 591 (1948).

I find the doctrine of res judicata plainly inapplicable because the situation before me fails to meet one critical element of the Lawlor test: the Iowa and New York suits are not based on the "same cause of action". It is of course true, as defendant points out, that in both cases the same renewal copyright is alleged to be infringed. But the acts of infringement complained of are different. Lawlor itself stands for the proposition that separate wrongs, although similar in nature, give rise to separate causes of action. The Court held that a prior consent judgment of dismissal in a private antitrust action did not bar a similar action based on subsequent acts of the defendant, although such acts were of the same nature as those challenged in the first suit. The Court rejected the theory embraced by the lower court that the suits were based on the same cause of action because they involved "essentially the same course of wrongful conduct". Nickerson v. Kutschera, 295 F.Supp. 1 (D.Del. 1969), comes even closer to the instant case. There the court held that successive actions alleging infringement of the same patent could not be based on the same cause of action because "[p]laintiff's right in each case is claimed to have been invaded by different acts of wrongdoing ..." See also, 1B Moore's Federal Practice, ¶ 0.410[1].

Because the causes of action are different, defendant cannot invoke the principle of res judicata or avail himself of the

Nasser holding, which applies only to an identical cause of action asserted in a later suit.[14/] Nor can it be sensibly argued that the instant action is barred by collateral estoppel. As was pointed out in Lawlor, that doctrine precludes relitigation of issues actually litigated and determined in a previous action. In the Iowa action, however, nothing was litigated and hence nothing determined; the action was dismissed because of plaintiff's failure to comply with the court's discovery rulings. Such a dismissal can have no collateral estoppel effect. See Canaan Products, Inc. v. Edward Don & Company, 388 F.2d 540 (7th Cir. 1968); 1B Moore's Federal Practice. ¶ 0.444. Accordingly, the motion of defendant Killiam Shows to dismiss is denied.

Conclusion

For all of the reasons herein stated, I hold that plaintiffs' renewal copyright in the novel "The Sons of the Sheik" was infringed by the performances of the motion picture "The Son of the Sheik" on July 13, October 11, and October 16, 1971. I further hold that defendants Killiam Shows, Inc. and Educational Broadcasting Corporation are jointly and severally liable for such acts of infringement. Finally, I hold that defendants Paul Killiam and Bowery Savings Bank are not liable, and the action is accordingly dismissed as against them.

IT IS SO ORDERED.

Dated: August 8, 1974

U. S. D. J.

Footnotes

1/
The underlying facts are largely undisputed; indeed, the brief recitation of the evidence that ensues is based principally on an extensive stipulation of facts to which all parties agreed.

2/
Neither the novel nor the motion picture was produced in evidence. I have not read the novel, and I have not seen the motion picture since the time I was taken by my parents as a young boy. The parties, however, have stipulated as follows: "The photoplay embodies incidents portrayed in the work, utilizes the characters created by the Author appearing in and acting out sequences from the work, and was and is a dramatic version of the work in motion picture form." (Stipulation of Facts, ¶ 13.)

3/
It might be noted at this juncture that Cecil Hull is a nominal party plaintiff and has been joined solely because she is the record owner of the renewal copyright to the novel. Independent Wireless Telegraph Company v. Radio Corporation of America, 269 U.S. 443 (1926). Miss Hull has been confined to a nursing home in England since 1969, and her joinder in this action has been authorized by the Court of Protection in Great Britain.

4/
S.1361, introduced in the 1st Session of the 92nd Congress.

5/
Defendants' reliance on Stuff v. E.C. Publications, Inc., 342 F.2d 143 (2nd Cir. 1965), is misplaced. There plaintiff, the owner of a copyright on a caricature, was found to have abandoned the copyright because he "authorized or acquiesced in". the wide circulation of a large volume of nearly identical prints that did not bear his copyright notice. As I read the case, the court's decision turned on the absence of proper notice on the prints, and plaintiff's apparent acquiescence in such omission. There is no showing of a comparable absence of notice in the instant action.

6/
Defendants have so stipulated. See Stipulation of Facts, ¶ 33.

7/
Nimmer emphasizes, in § 149.2 that the doctrine should be invoked only when plaintiff has engaged in serious acts of wrongdoing. By way of illustration he mentions: falsification of a court order; falsification of evidence; misrepresentation by plaintiff of the scope of his copyright; the procuring of information about defendant's work by improper means. Each of these represents a substantial affront to the legal process itself; by no stretch of the imagination could Rohauer's activities be so characterized.

8/
In their trial memorandum defendants rely on another action which they also claim to be indicative of unclean hands. In the 1925 assignment of rights by Edith Hull to Moskowitz, the seller undertook to procure the renewal of the copyright and thereupon to assign the motion picture rights to the purchaser for the renewal term. Elsewhere in the document it was stated that the agreement would bind the heirs, successors and assigns of the original parties. Defendants allege that Cecil Hull, her mother's heir and successor, breached her obligation to assign the motion picture rights in the renewal term to Killiam, Moskowitz' successor. This "breach of contract", the argument runs, establishes the unclean hands of the plaintiffs.

This overlooks the doctrine, alluded to earlier, that those who succeed to the renewal rights are not bound by the original copyright proprietor's prior assignment of renewal rights. Miller Music Co. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960); Shapiro, Bernstein and Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2nd Cir. 1946). Cecil Hull has thus breached no obligation to the defendants, and cannot be accused of unclean hands under this theory.

9/
Another relevant consideration, as Judge Lasker noted, is whether the defendants' work tends to diminish the demand for the original. In this regard, an example cited by Nimmer at § 145 of his treatise closely parallels the instant action:

"Suppose A is the copyright owner of a published novel. B produces a motion picture copied from and substantially similar to A's novel. The motion picture may well not adversely affect the sale of A's novel. In fact it almost certainly will have the opposite effect. It is nevertheless clear that B may not invoke the defense of fair use. B's motion picture has not prejudiced the sale of A's work in the book medium, but it has certainly prejudiced the sale of A's work in the motion picture medium. If the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the right to convert to motion picture form) the use is not fair even if the rights thus effected have not as yet been exercised by the plaintiff."

10/
Dodd, Mead acquired Small, Maynard & Co., the original publisher of the novel, in 1929.

11/
17 U.S.C. § 209:

"§ 209. Certificate of registration; effect as evidence; receipt for copies deposited
In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and

address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration."

12/
Berne Convention, Article 7, set out in Appendix O, Nimmer on Copyright, p. 1021.

13/
See Copinger and Skone James, Copyright (10th ed., 1965) at ¶ 369. See also Copyright Act of 1956, Eighth Schedule, paragraph 6.

14/
The Nasser doctrine would obviously be fully applicable if Rohauer now sought to prosecute an action in this court based on the acts of infringement alleged in the Iowa action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RAYMOND ROHAUER and CECIL W. HULL, : Index No. 71 Civ. 4183 (L.W.P.)

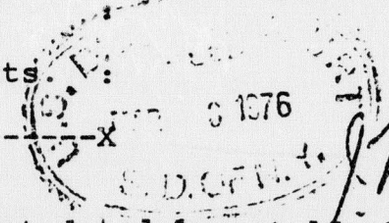
Plaintiffs, :

-against- : FINAL JUDGMENT

KILLIAM SHOWS, INC., PAUL KILLIAM, EDUCATIONAL BROADCASTING CORPORATION and THE BOWERY SAVINGS BANK, : #76,183

Defendants. :

----------X



An Interlocutory Judgment dated August 15, 1974 having been entered herein dismissing the Complaint as against defendants Paul Killiam and The Bowery Savings Bank, granting plaintiffs injunctive relief as against defendants Killiam Shows, Inc. and Educational Broadcasting Corporation and referring the issues of damages and counsel fees to a Magistrate of this Court, and a hearing having been held before Magistrate Charles J. Hartenstine who rendered his Report thereon dated November 13, 1975, as corrected on November 15, 1975, and plaintiffs having filed Objections to said Report insofar as the same denied any award of counsel fees to plaintiffs, and defendants Killiam Shows, Inc. and Educational Broadcasting Corporation having filed Objections thereto insofar as the same awarded plaintiff Raymond Rohauer statutory damages in the sum of $2,250, and this Court having considered said Objections and having made an Order dated February 2, 1976 adopting the Report and Recommendations of the Magistrate in all respects, it is hereby

ADJUDGED that the Report and Recommendations of the Magistrate dated November 13, 1975 be, and the same hereby are, adopted in all respects, and it is further

ADJUDGED that plaintiff Raymond Rohauer recover from defendants Killiam Shows, Inc. and Educational Broadcasting Corporation the sum of $2,250 as damages for their infringing acts and that said plaintiff recover his costs and disbursements to be taxed by the Clerk of this Court.

Dated: New York, New York
February 25 1976

U.S.D.J.

JUDGMENT ENTERED - 3/5/76
Raymond J. Burghardt
CLERK

UNITED STATES COURT OF APPEALS
For the Second Circuit

Raymond Rohauer and Cecil W. Hull,

Plaintiff-Appellee,

against

Killiam Shows, Inc., Paul Killiam, Educational Broadcasting Corporation, and The Bowery Savings Bank,

Defendants,

Killiam Shows, Inc., Educational Broadcasting Corporation,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Mark A. Horowitz , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 234 West 16th Street, New York, New York
That on July 22, 1976 , he served three copies of the Joint Appendix on

Herbert P. Jacoby, Esq.
Burns & Jacoby
Attorney for Plaintiffs-Appellees
445 Park Avenue
New York, New York 10002

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

. . . . . .

Sworn to before me this
22nd day of July , 1976

Mark A. Horowitz

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977